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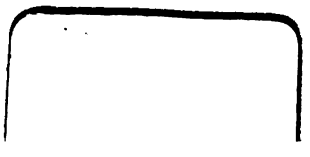

Ct. Brit. Parliament. House of Lords,

CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

3° & 4° VICTORIÆ,

SESSION OF PARLIAMENT 1840.

REPORTED BY

GEORGE ROBINSON, ESQ.,

BARRISTER AT LAW.

By Appointment of the House of Lords.

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The Right Honourable

LORD COTTENHAM,

LORD HIGH CHANCELLOR OF GREAT BRITAIN.

RIGHT HONOURABLE CHARLES HOPE, LORD JUSTICE GENERAL, AND LORD PRESIDENT OF THE COURT OF SESSION.

RIGHT HONOURABLE DAVID BOYLE, LORD JUSTICE CLERK.

JOHN HOPE, ESQ., DEAN OF THE FACULTY OF ADVOCATES.

ANDREW RUTHERFURD, ESQ., LORD ADVOCATE.

JAMES IVORY, ESQ.
succeeded by
THOMAS MAITLAND, ESQ. } SOLICITOR GENERAL.

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INDEX OF MATTERS.

AGENT AND CLIENT.

A law agent acting in the double capacity of agent for borrower and lender took an assignation to a lease as the lender's security, but without intimation to the landlord, or taking possession under the assignation. A feu right to the subjects was thereafter acquired by the borrower, who thereupon granted securities to a large amount over the property. A postponed security was thereafter taken for the original lender, on the supposition that the security under the lease had been evacuated by the feu right. The agent was in the knowledge of the extent of the prior burdens, but refrained from communicating it to the lender; the subjects afterwards fell very much in value, and proved insufficient for the prior burdens. It was alleged on the part of the agent, that, from recent valuations of the property, he had good reason to believe it was worth 12,000*l.* or 13,000*l.* more than the amount of the prior burdens at the date of the loan:—Held (affirming the judgment of the Court of Session) that the agent was liable for the sum so lent. Donaldson v. Haldane, - - page 226

AMENDMENT OF LIBEL. See *Title to pursue*, 4.

ASSIGNATION. See *Title to pursue*, 2.

CAUTION. See *Guarantee*.

CAUTIONER.

Circumstances in which held (affirming the judgment of the Court of Session) that a cautioner had not been discharged from his obligation in respect of the conduct of the obligees in reference to the principal; and observed, per L. C., "The case of M'Tag- "gart (1 Sh. & M'Lean, 553,) is of the highest importance, as it "makes the rule applicable to such cases (i. e. suretyship obligations) "the same in Scotland as in England. Upon the rule in "England there is no doubt. It is familiar to every lawyer, and "I am glad to be able to expound it in the terms which a "Judge of the highest authority (Lord Eldon) has laid it down, "and which I think entirely correct. The rule is this, 'that if "'a creditor without the consent of the surety give time to the "'principal debtor, by so doing he discharges the surety, that is, "'if time be given by virtue of positive contract between the "'creditor and principal, not where the creditor is merely in- "'active.'" Creighton v. Rankin, - - - 99

INDEX OF MATTERS.

CORPORATION.

Held (affirming judgment of Court of Session, pronounced on a remit from the House of Lords,) 1, that the Faculty of Physicians and Surgeons of Glasgow are a corporation; 2, that the adjection of a penalty in the grant of corporation, for contravention of corporate privileges does not preclude the corporation from the benefit of an interdict. University of Glasgow v. Physicians and Surgeons, - - - - page 397

COSTS.

1. Held, that costs in the House of Lords were properly awarded to a party under a remit with authority to determine the same. University of Glasgow v. Physicians and Surgeons, - 397
2. Costs awarded against an appellant held not to include the costs of discussing the competency of the appeal, on the ground that the costs had not been reserved in the judgment sustaining the competency. Campbell v. Campbell, - - - 1
3. The practice, in Scotland, of allowing costs out of an estate or other fund to a party who has attempted unsuccessfully to set aside an existing settlement thereof, observed upon, and the reconsideration of it strongly recommended to the Court. Earl of Strathmore v. Paul and others, - - - 189
4. There cannot be a cross appeal merely as to the question of costs. Kedder v. Reid and others, - - - 183

DOMICILE.

Where a party was born and had heritable estate in Scotland, held, in the circumstances as proved, (reversing the judgment of the Court of Session,) that the domicile of origin must prevail, because there was no intention to abandon it, and the party had not animo et facto acquired a new domicile. Munro v. Munro, - - - - - - 492

Per LORD CHANCELLOR.—"In questions of domicile, it is, I "conceive, one of the established principles, that the domicile of "origin must prevail until the party has not only acquired "another, but has manifested and carried into execution an "intention of abandoning his former domicile and acquiring "another as his sole domicile. Such, after the fullest considera- "ration of the authorities, was the principle laid down by Lord "Alvanley in Sommerville v. Sommerville (5 Vesey, 787), and "from which I see no reason for dissenting." S. C. - 492

See *Marriage*.

ENTAIL.

1. Two separate deeds of entail executed as procuratories of resignation by the same party were inserted in one charter, the clauses verbatim the same in each entail not being repeated, the charter at the same time setting forth the fact that there were two separate entails: Held (affirming the judgment of the Court of Session) that although ex figurâ verborum the construction of the charter might raise the inference that a contravention of the one entail would induce a forfeiture of both

ENTAIL—*continued.*

estates, the charter must be construed applicando singula singulis, and that therefore an heir of entail possessing under the charter so framed and under a subsequent charter of resignation expede by him, and framed in similar terms, had not possessed adversely to the original entail, but was subject to the fetters thereof. Graham v. Bontine, - - - page 346

2. A. in 1767 executed an entail of his estates in the form of a procuratory of resignation comprehending, inter alia, the lands of C. & D. The lands of C. were held of a subject superior. The dominium directum of the lands of D. had been previously in the possession of A.'s family, the dominium utile was conveyed to A.'s father in 1708 by disposition from the then owner; no infeftment was taken thereon till 1757, when A., as heir of his father, executed the precept, and was infeft, and in 1765 A. granted a charter of confirmation to himself. The other lands comprehended in the entail were held of the Crown. A. died without having executed the procuratory, and was succeeded by his son, who, after executing the procuratory, obtained a Crown charter in 1779, comprehending inter alia the lands of D., but died without being infeft. On his death B., the grandson of A., took infeftment on the Crown charter so obtained. In 1814 B. obtained a precept of clare constat from the superior of C., was infeft, and disponed the lands of C. In 1815 B. obtained a decree reducing A.'s infeftment on the disposition of 1708, and disponed the lands of D. In an action against B., by the next substitute, to have it found that in consequence of the fee-simple titles made up to the lands of C. and D., and of his having alienated them, the whole remaining entailed estate devolved to him from the date of citation: Held (affirming the judgment of the Court of Session), 1st., that B. was subject to the entail in regard to the lands of C.; 2d., that the dominium utile of D. had been consolidated with the superiority, and that, with regard to the lands of D. also, B. was subject to the entail; and therefore that the pursuer of the action was entitled to decree in terms of the libel. S. C. - - 346

3. A. died, leaving a strict entail of his estate, in the form of a procuratory of resignation, unexecuted, in favour of himself, and after his decease, B., and the heirs male of his body; whom failing, C., and the heirs male of his body; whom failing, other substitutes. B. resigned upon the procuratory, and obtained a Crown charter, and took infeftment, but without having served. Some time after (the entail being recorded) B. brought a reduction, in which he obtained a reduction, in the absence of the deed of entail, upon the ground of defective execution, and a reduction of the titles made up as struck at by stat. 1693, c. 35. B. then served in fee simple, obtained a charter, and was infeft. Several years afterwards C. brought a reduction of the decree, and of the titles originally made up under the entail de novo, and of the fee-simple title, coupled with a declarator of the validity and of contravention, and obtained decree in terms of

ENTAIL—*continued.*

the prior conclusions of the libel, the remaining conclusions being superseded. Meantime B. executed the original procuratory de novo, obtained a charter in terms of the entail, and was infeft.—Held (affirming the judgment of the Court of Session), 1, that the title so made up under the entail was a complete feudal title; 2, that the mere possession of the estate on this title was not sufficient purgation; but, 3, that on the defender undertaking to find the most ample caution that no debts or deeds of his during his fee-simple possession should affect the estate directly or indirectly, there being no allegation made that any such debts or deeds existed, was entitled to be assoilzied in hoc statu from the conclusions of forfeiture, and quoad ultra to have the action dismissed. Abernethie v. Forbes, - - - - - - page 434

ERASURE. See *Writ*, 4.

GUARANTEE.

The term guarantee is not equivalent to caution. Per L. C. in Wilson v. Tait and others, - - - - 137

INVESTITURE. See *Entail*, 3.

IRRITANCY. See *Entail*, 3.—*Personal or Real.*

IRRITANCY, DECLARATOR OF.

Opinion expressed by Lord Brougham as to the form of a summons of declarator of irritancy, and the findings to which the pursuers were, under the conclusions of the summons, in the circumstances, entitled. Tailors of Aberdeen v. Coutts, - 296

IRRITANCY, PURGATION OF. See *Entail*, 3.

LEGITIMATION PER SUBSEQUENS MATRIMONIUM. See *Marriage*.

MARRIAGE.

1. A., a domiciled Scotchman, cohabited with M., an unmarried woman, a native of and resident in Scotland; they went to England, and had a son born there. Several years after the birth of J., his parents A. and M., by a written contract made at Penrith, acknowledged themselves husband and wife, and soon after went to Scotland, where they cohabited together as husband and wife, and were habit and repute married persons till A.'s death. A. died possessed of entailed estates in Scotland:—Held (affirming the judgment of the Court of Session) that J. was the legitimate son of A., and as such entitled to all the rights and privileges of a child born in lawful wedlock. Countess of Dalhousie v. M'Douall, - - - - - - 475
2. H., a domiciled Scotchman, proprietor of entailed estate in Scotland, cohabited with J., an unmarried woman, a native of and resident in England, and had by her a daughter, M., who was born in England. Several years after the birth of M., her

MARRIAGE—*continued.*

parents, H. and J., were married in England:—Held (in concurrence with the opinions of the majority of the Judges of the Court of Session) that M. was the lawful daughter of H. Munro v. Munro, - - - - - page 492

3. A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. A. died seised of real estate in England, and intestate: — Held (after consulting the Judges and affirming Judgment of King's Bench) that B. was not entitled to such property as the heir of A. Doe, dem. Birtwhistle, v. Vardill, Appendix, - - - 627

OBLIGATION. See *Prescription, Septennial.*

ORDERS IN COUNCIL. See *Pactum Illicitum*, 2.

PACTUM ILLICITUM.

1. A verdict is taken by consent in a prosecution in Exchequer under the statute 1 Geo. 4. c. 74., for a sum agreed on less than the penalties: one of the defendants overpays his share of said sum, and raises an action in the Court of Session against the others for contribution: Question, Whether the illegality of the original act can, in the circumstances, be pleaded in bar. Campbell v. Campbell, - - - - - - 1

2. An American ship was sent from Britain on a joint adventure to the coast of Africa for the purchase of slaves; a quantity of arms and gunpowder were sent also from Britain by a British ship under the direction of the party conducting the adventure, security having been found, in terms of the existing regulations, that the same should be expended in trade upon the coast of Africa; the arms and gunpowder were afterwards transhipped on board the American on the African coast, and the American ship was seized and condemned as contraband: — Held (affirming the judgment of the Court of Session) that the whole transaction was illegal, and that consequently no action of accounting in regard thereto could be maintained between the parties concerned. Stewart v. Gibson, - - - 260

PART AND PERTINENT. See *Tack.*

PENALTY. See *Corporation.*

PERSONAL OR REAL.

Held (affirming the judgment of the Court of Session) that certain obligations in a burgage disposition were of such a nature as to be binding upon singular successors, without being declared real burdens, or being fenced with irritancies. Tailors of Aberdeen v. Coutts, - - - - - 296

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PLEADING. See *Irritancy, Declarator of — Practice — Process.*

PRACTICE.

1. A cause was remitted de plano to the jury roll, a record was made up, the parties went to trial, and a verdict was returned for the pursuer:—Held (affirming the judgment of the Court of Session, which decerned in terms of the libel,) that the defender could not obtain a new trial, or arrest judgment upon the verdict, on the ground that he had not previously had an opportunity of taking advantage of an alleged plea in bar, which he had originally put upon record. Campbell v. Campbell, - page 1
2. A summons concluded against several defenders conjunctly and severally; a verdict was returned finding them liable for the sum claimed, and interest, as libelled; the Court of Session decerned against the defenders conjunctly and severally: In the course of an appeal against the judgment an objection raised on the ground of discrepancy between the verdict and judgment held to be untenable. S. C. - - - - - - 1
3. Parties by a joint minute agreed to take judgment upon a certain admitted state of facts:—Held, per Lord Chancellor, to be incompetent to refer to documentary evidence previously produced in process, in support of statements made at the hearing. Reid v. Baxter and others, - - - - - 66

See *Process — Title to pursue*, 4.

PRESCRIPTION, SEPTENNIAL.

A sum of money was lent upon a bond and disposition in security, and by a letter of the same date another party, after stating that such bond had been granted in security of the money lent, "guaranteed" to the parties advancing the money "the payment of the sum contained in the bond, whenever the same "shall be demanded in terms of the stipulations of the said "bond, and that in addition to the personal and heritable security contained in the said bond," he being entitled to an assignation, at his own expense, when required. The bond and disposition in security made no mention of the letter and contained no clause of relief. The party granting the letter having pleaded the septennial prescription in defence to an action for the money lent by the creditors in the said bond:—Held (affirming the judgment of the Court of Session) that he was not entitled to the benefit of the act. Wilson v. Tait and others, - - 137

PRESCRIPTION, VICENNIAL.

In 1809 a party was served nearest and lawful heir to the grantor of a deed of settlement, and he thereupon executed a ratification of the said deed. A reduction of the deed, and of the service and ratification, was brought by another party in 1833, on the ground that he was a nearer heir of the grantor:—Held (affirming the judgment of the Court of Session) that the statute 1617, c. 13., was rightly pleaded in bar of the action. Neilson v. Cochrane and others, - - - - - 82

PROCESS.

A summons before the Sheriff Court stated that one of the defenders, a cautioner, together with the principal and other cautioners, had been applied to for payment, and had refused unless compelled; and then, omitting the name of the said defender, but stating the name of the principal and of the other cautioners, concluded "that the said principal and cautioners foresaid" might be decreed to pay. To this summons the said defender appeared, and put in defences, and did not raise any objection to the summons on this ground. After his death his representative sisted himself as a defender, but did not raise the objection, and a decree for payment was pronounced against him:—Held (affirming the judgment of the Court of Session in an advocation) that there was no ground under the circumstances, for setting aside the proceedings. Creighton v. Rankin, - page 99

See *Irritancy, Declarator of—Title to pursue*, 4.

PROOF.

Held (affirming judgment of the Court of Session) incompetent to allow proof by the writer and instrumentary witnesses that important words in a deed were written upon erasures, in presence of the grantor, before or at the time of his subscribing the deed, and that the testing clause was filled up in his presence. Kedder v. Reid and others, - - - - - 183

See *Agent and Client—Domicile.*

PUBLIC OFFICER.

Held (reversing the judgment of the Court of Session) that the commissioners of police, under the Edinburgh Police Acts, are not liable to be sued for damages for alleged acts of wilful oppression and cruelty by inferior officers not done or ordered by the said commissioners. Thomson v. Mitchell, - 162

REPARATION. See *Agent and Client.*

ROAD. See *Title to pursue*, 1, 2.

SASINE.

Observed by Lord Brougham, in reference to the judgment of the Court of Session in Gordon v. the Earl of Fife, in 5 S. & D. 517. (not appealed), "I must fairly add that I do not go very wil-
"lingly, or indeed very easily, along with that decision, and that
"the judgment delivered by the Lord President Hope, and in
"which Lords Gillies, Alloway, Eldin, and Corehouse concurred,
"would have satisfied my mind." Hoggan v. Ranken, - 173

See *Writ*, 2.

SCHOOLMASTER.

Held (affirming the judgment of the Court of Session) that although a private body of subscribers to an academy may have obtained a charter of incorporation, a teacher appointed by them is not to be regarded as a public officer holding his situation ad vitam aut culpam. Gibson v. Ross, - - 16

SERVICE. See *Prescription, Vicennial.*

SETTLEMENT. See *Writ*, 4.

SOCIETY. See *Title to pursue*, 3.

STATUTES 1494, c. 57., (Summons of Error.) See *Prescription, Vicennial.*

——— 1540, c. 117. } (Execution of Writs.) See *Writ*, 1.
——— 1579, c. 80. }

——— 1617, c. 12 & 13. (Vicennial Prescription.) See *Prescription, Vicennial.*

——— 1685, c. 22. (Tailzies.) See *Entail*, 3.

——— 1695, c. 5. (Septennial Prescription.) See *Prescription, Septennial.*

——— 29 Geo. 2. c. 16. (Exportation of Fire-arms, &c.) See *Pactum Illicitum*, 2.

——— 8 Geo. 3. c. 63., and other Statutes, to 1 Geo. 4. c. 48. (Forth and Clyde Navigation Acts), Construction of.—Held, construing the above statutes (affirming the judgment of the Court of Session, adhering to the Lord Ordinary's interlocutor), that the Canal Company are not bound to deepen and enlarge the Forth and Clyde Canal, or any part of it, to the depth of ten feet, and that they are not bound to alter, enlarge, and deepen that part of the said canal extending from Port Dundas to St. Rollox Works, "so as to be of the same depth and dimen- "sions with the remainder of the collateral cut, and of the other "parts of the main canal." Tennant and others, v. Forth and Clyde Navigation Company, - - - page 30

——— 33 Geo. 3. c. 2. (Exportation of Gunpowder, &c.) See *Pactum Illicitum*, 2.

——— 1 Geo. 4. c. 74. (Excise Penalties.) See *Pactum Illicitum*, 1.

——— 3 Geo. 4. c. 78. (Edinburgh Police Act.) See *Public Officer.*

——— 4 Geo. 4. c. 49. (General Road Act.) See *Title to pursue*, 1.

——— 6 Geo. 4. c. 120. (Court of Session Process.) See *Title to pursue*, 4.—*Personal or Real.*

——— 1 & 2 W. 4. c. 43. (General Road Act.) See *Title to pursue*, 1.

TACK.

Certain distillery premises were let by articles and conditions of tack, and the extent of ground and premises and other pertinents to which the tacksmen had right was made the subject of arbitration; it having been found by the award that the tacksmen were entitled to a definite portion of ground, as a stance for a straw-yard as a pertinent to a piggery, and which was "awarded for that purpose accordingly," and that they were also entitled to possession of a certain space of ground as a roadway:—Held (affirming the judgment of the Court of Session)

TACK—*continued.*

that the landlord was entitled to interdict the erection of any buildings, on the two pieces of ground so awarded, and the using the said pieces of ground in any manner different from the purposes for which they were respectively allotted by the said award. Walker v. Grant, - - - page 154

TESTING CLAUSE.

Observations per Lord Brougham as to the practice in filling up testing clauses of deeds. Kedder v. Reid and others, - 183

See *Writ*, 3.

TITLE TO PURSUE.

1. Held (on construction of the general road acts) that when a road is divided into districts assigned to committees of trustees, the clerk appointed for any district is entitled to sue under the 16th section of 1 & 2 W. 4. c. 43. Creighton v. Rankin, - 99
2. Question,—Whether by the law of Scotland, one party can enable another to maintain a suit in his own name, while the property in the subject matter of the suit remains in the party giving the authority to sue, S. C. - - - 99
3. Question,—Whether one partner of a company, out of the funds of which the expense of fitting out the vessels on a joint adventure was defrayed, is entitled, privato nomine, to sue a third party, an alleged participant in the adventure, for a proportion of such advance,—raised, but not decided, in respect it was held (reversing the judgment of the Court of Session), that, in the circumstances, the claims insisted on were not well founded. Stewart v. Gibson, - - - - - 260
4. A party who was heiress under a certain deed of entail, and also a beneficiary under a trust deed of the remainder of the entailer's estate not included in the entail, (executed of the same date as the entail,) containing powers of sale, and directing the undisposed of residue to be settled on the series of heirs mentioned in the entail, brought an action of reduction of a sale of part of the trust property "as heiress of entail," and, "as such and "otherwise," having good right to pursue. No mention of the trust deed was made in the libel of the summons, but in the second reason of reduction it was stated to be a deed in favour of such persons, uses, &c. as were declared in and by the entail, &c. Held (affirming the judgment of the Court of Session) 1. that the pursuer could not insist in the action in respect that the title under the trust was not relevantly libelled in the summons; 2. that, in the circumstances, an amendment of the summons was incompetent. Munro or Ross v. Paul, - 246

VITIATION. See *Writ*, 2, 3, 4.

WRIT.

1. A party was able to write, and was in the practice of subscribing writings requiring his signature; his eyesight, however, was so defective, that he could not read any written document, nor

WRIT—*continued.*

decipher a signature attached to it, although at the time when he signed his own name he could infer, from general appearances, that he had adhibited his subscription, but not by his mere vision decipher the same afterwards. Under these circumstances he executed, by the intervention of notaries, a trust testamentary disposition and codicils:—Held (affirming the judgment of the Court of Session) that the deed was not liable to objection in respect of its execution; that the form of execution adopted was good; that the party might, if he pleased, execute the deed by his own signature, but that he was also at liberty to resort to the assistance of notaries. Reid v. Baxter and others, - - - - - - - page 66

2. Held (affirming the judgment of the Court of Session) that an instrument of sasine was null and void, the word "three" in the year of the Christian era (1803) denoting the date of the sasine, being written upon an erasure. Hoggan v. Ranken, - 173

3. In a mortis causa disposition of lands, the letters "ohn" in the word "John," the Christian name of the apparent disponee, were written on erasures throughout the body of the deed. It was admitted that the word "James" had stood in place of "John" throughout. In the testing clause, after the words "are "subscribed" there was inserted the words "in favour of the "said John Kedder, my son," but no notice was taken of the erasures which existed in the body of the deed: Held (affirming the judgment of the Court of Session) that the deed was invalid. Kedder v. Reid and others, - - - 183

4. A settlement of heritable estate was made by three relative deeds; viz. 1, a deed of entail; 2, a relative deed of nomination of heirs; and, 3, a trust disposition for certain temporary purposes under burden of what the other two deeds were granted. These deeds were all executed on the same day, and a duplicate of each deed was executed at the same time. There were numerous erasures and superinductions in the deeds and duplicates, but, with two immaterial exceptions, no erasure occurred in the same part of both deed and duplicate, the deed being entire wherever the duplicate was erased, and vice versâ. No notice of the erasures was taken in the testing clauses of the deeds or duplicates, but in the testing clause of each deed special reference was made to the simultaneous execution of a duplicate, and vice versâ: Held in a reduction by the heir at law of the settlor, (affirming the judgment of the Court of Session,) that the deeds were, in the circumstances, unchallengeable and formed together a valid and effectual settlement. Earl of Strathmore v. Paul and others, - - - - - - - - 189

See *Proof—Testing Clause.*

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1840.

[13*th February* 1840.]

ALEXANDER CAMPBELL, Appellant.[1] (No. 1.)

[*Attorney General* (*Campbell*) — *James Anderson.*]

DUNCAN CAMPBELL, Respondent.

[*Lord Advocate* (*Rutherfurd*) — *G. Graham Bell.*]

Pactum illicitum—Practice—Pleading—Costs.—1. A cause was remitted de plano to the jury roll, a record was made up, the parties went to trial, and a verdict was returned for the pursuer: — Held, (affirming the judgment of the Court of Session, which decerned in terms of the libel,) that the defender could not obtain a new trial, or arrest judgment upon the verdict, on the ground that he had not previously had an opportunity of taking advantage of an alleged plea in bar, which he had originally put upon record.

2. A verdict is taken by consent in a prosecution in Exchequer under the statute 1 Geo. 4. c. 74., for a sum agreed on less than the penalties: one of the defendants

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[1] Sequel of cause decided last session. See Maclean and Robinson, House of Lords Reports (1839), p. 387.

overpays his share of said sum, and raises an action in the Court of Session against the others for contribution: Q. Whether the illegality of the original act can, in the circumstances, be pleaded in bar.

3. A summons concluded against several defenders conjunctly and severally; a verdict was returned finding them liable for the sum claimed, and interest, as libelled; the Court of Session decerned against the defenders conjunctly and severally: In the course of an appeal against the judgment an objection raised on the ground of discrepancy between the verdict and judgment held to be untenable.

4. Costs awarded against an appellant held not to include the costs of discussing the competency of the appeal, on the ground that the costs had not been reserved in the judgment sustaining the competency. (See p. 14.)

2D DIVISION.

Lord Ordinary Fullerton.

Statement.

A PROSECUTION was raised in the Exchequer under the statute 1 Geo. 4. c. 74., against the appellant and respondent and two other persons of the name of M^c^Andrew, partners in a distillery company, which resulted in an arrangement, whereby it was agreed, that a verdict should be taken by consent for the sum of 3,000*l.* (a sum considerably under the amount o penalties sued for). The respondent, Duncan Campbell, paid the amount, and afterwards recovered part of it from the company's effects. He then raised an action in the Court of Session for the balance against the appellant, and the two other persons above named, concluding that they should be decerned and ordained, conjunctly and severally, to pay him a proportionate part of said balance. Separate defences were given in, and each defender put in a plea, founded in substance on the illegality of the original transaction, though not precisely in similar terms. The cause was remitted to the jury roll, and a record made up, in which the plea

of illegality was repeated. Issues were then settled and approved of in an alternative form, as follows; viz. "Whether the defenders, or any of them, were guilty "of the said contravention of the said laws, whereby "the said company were subjected in the said penalty, "and obliged to pay certain expences? and, whether "the defenders, or any of them, are indebted and rest- "ing owing to the pursuer in the sum of 1,171*l.* 5*s.* 1*d.*, "or any part thereof, with interest thereon, as the "balance of the said penalty and expences? OR whether "the said contravention of the said laws was with the "knowledge of the pursuer?" Upon these issues the parties went to trial, in the course of which evidence was adduced on both sides. The jury returned a verdict in the following terms:—"At Edinburgh, the 22d, "24th, and 25th days of March, 1834. Before the "Right Honourable David Boyle, Lord President of "the second division of the Court of Session, compeared "the said pursuer and the said defenders by their re- "spective counsel and agents; and a jury having been "impannelled and sworn to try the said issues between "the said parties, say, upon their oath, that in respect "of the matters proven before them they find for the "pursuer on both issues, and that the defenders are "indebted to the pursuer in the sum of 1,059*l.* 5*s.* 1*d.*, "with interest, as libelled."

The appellant then moved for a new trial, inter alia, on the ground that the established rules of the Court precluded him from urging his plea of illegality at a previous stage of the cause, and as the plea was a complete bar to the action, the verdict must necessarily be set aside; the Court, however, refused to grant a new trial. A motion was then made to apply the verdict,

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Statement.

which, as alleged by the appellant, was resisted by him, in respect he was entitled to have the judgment arrested, upon the same ground on which he had unsuccessfully founded his motion for a new trial. The Court, however, pronounced the following interlocutor: — "In

4th July 1834. "respect of the verdict found by the jury on the issues "in this cause, the Lords decern against the defenders "conjunctly and severally for payment to the pursuer "of the sum of 1,059*l.* 5*s.* 1*d.*, with interest, as libelled; "find the defenders liable to the pursuer in the expenses "incurred in this action, appoint an account thereof to "be lodged, and remit to the auditor to tax the same, "and to report."

The defender, Alexander Campbell, appealed.[1]

The cause having been put down for hearing on the merits:—

Appellant's Argument.

Appellant.—1. The objection to the action, as being at the instance of one wrong-doer against others involved in the same delict, is in law well founded. In England it is settled that there can be no contribution among wrong-doers[2], and such also is the rule in Scotland.[3] [LORD CHANCELLOR.—Have you any case where a defender, after appearing and consenting to a verdict against himself and others, refused to pay his share in

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[1] See discussion on the competency of the appeal, which was sustained as an appeal against a final judgment of the Court applying the verdict, and decerning for a certain sum with interest, ante, p. 1.

[2] Phillips v. Biggs, Hardres, 164; Merryweather v. Nixan, 8 T. R. 186; Farebrother v. Ansley, 1 Camp. 343; Wilson v. Milner, 2 Camp. 452; Colburn v. Patmore, 1 Cro., Mees., & Rosc., 73.

[3] Gibson v. Stewart, 6 Sh. & Dun. 733; M'Ghie v. Butter, 7 S. & D. 797; 1 Bell Com. 236.

the face of his admission that the verdict was taken of consent, as stated on page 15, appellant's case? In the cases cited it was proved to the jury that the party was a wrong-doer. Here the respondent was not aware of the wrong done.] The rule is of universal application. Besides, stat. 1 Geo. 4. c. 74. imposes penalties on parties "knowingly" offending, whereas other excise statutes authorize conviction whether the party is cognizant or not. The party cannot, in the face of the conviction, allege innocence; the rule applies à fortiori, in a conviction obtained of consent.

2. There was no opportunity of taking the objection before verdict. It was imperative on the Lord Ordinary to remit the cause to the jury roll; the appellant could not reclaim against such remit.[1] This is not one of those collateral points of law which are sometimes disposed of before trial, but a plea to exclude the action. The points of law which the statute provides for the disposal of are points arising during the progress of the cause towards an issue; but the plea under consideration strikes at the subsistence of the cause. It cannot be discussed by sending the cause from one roll to another. Its effect, if valid, is to prevent the cause being in the roll from which it is sent. It should be discussed in limine, but that is prevented by the words of the statute. There is an omission in the statute, by which a wrong is effected, which can only be remedied by arresting the judgment. The issues were as to mere matter of fact, viz., to the amount of a debt; not whether there was a debt; therefore matter for exception

[1] Montgomerie v. Boswell, M'L. & Rob. Rep. 163; Stat. 55 Geo. 3. c. 42. s. 4.; 59 Geo. 3. c. 35. ss. 2. 3. 6. and 15.

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Appellant's Argument.

could not arise.[1] It is open to question the materiality of the verdict when judgment is moved.[2] Although the defence be preliminary, or in bar of the action, the party is not precluded from discussing it, if reserved[3]; and even although not reserved, if the plea is repeated on the record, it has been held equivalent to a reservation.[4] [LORD CHANCELLOR.—You put it in your case that you did take the objection. You now say it was reserved.] The verdict proceeded on an issue that ought never to have been granted. It was immaterial, hence, non obstante veredicto, judgment should have been given in favour of the appellant.

3. The conclusion of the summons was against the defenders as "conjunctly and severally" liable; the verdict only found the defenders "indebted and resting "owing to the pursuer the sum of 1,059*l.* 5*s.* 1*d.*, with "interest as libelled," which infers a rateable, not a several, liability. The judgment against the defenders "conjunctly and severally" was therefore not warranted by the verdict.[5] [LORD CHANCELLOR.—Do not the words "as libelled" cover the whole.] That only means "interest as libelled," there being a separate calculation of interest.

Respondent's Argument.

Respondent.—1. The rule of law as to actions among wrong-doers has no application here. The ground of action is the compromise; not a conviction.

2. The appellant might regularly have urged his objection at different stages of the cause. He could have

[1] M'Kenzie v. Ross, 2 Murr. 20; M'Farlane, 3 Murr. 408.

[2] Clark, 1 Murr. 185; S. C. in Fac. Coll.

[3] Dickie v. Gutzmer, 6 S. & D. 637; and Hopkirk, in foot note, S. C. in 6 S. & D. 639.

[4] Johnstone v. Arnotts. 8 S. & D. 383.

[5] Clark. ut sup.; Bell's Dig. 537.

asked the Lord Ordinary to dispose of it as preliminary matter; he might have raised it before the issue clerks[1], or when the issues came to be approved; or he might have availed himself of the ten days allowed to submit the Lord Ordinary's interlocutor approving of the issues to review. But none of those remedies was adopted. The cause was remitted to the issue clerks on the motion of the appellant, who took the second or alternative issue, under which it was open to him to have insisted that the verdict in exchequer was probatio probata of the respondent's guilt. He might have asked the judge at the trial to give a direction in point of law disposing of his plea, and so made it matter of exception; and thus the question would have come under the notice of the Court. But instead of that he proceeded by the incompetent method of a motion for a new trial, which was refused[2], on the express ground that the appellant should have taken his remedy at the proper time.

3. If the appellant be liable at all, he is clearly liable for the whole sum concluded for. It is not necessary in a verdict or issues to use the words, "conjunctly and "severally;" and these words are not mentioned in the forms of issues by the late Lord Chief Commissioner Adam, in his work on jury trial. There is no material discrepancy between the verdict and judgment; on the contrary, the judgment follows directly from the verdict. [LORD CHANCELLOR.—There is nothing in the verdict to exclude a several liability.]

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[1] M'Farlane, Jury Trial, p. 47, *55*, and *56*.
[2] 12 D., B., & M., 870.

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Ld. Chancellor's Speech.

LORD CHANCELLOR. — If the argument had been confined to what appeared on the papers, I should have thought it an abuse of your Lordships time to hear the counsel for the respondent. But, as the argument of the appellant seemed to point at a peculiarity in the law of Scotland, as distinguished from that of England, I was desirous to obtain some further information, and the result is, that I am satisfied that there is as little in that point as I was before satisfied there was with respect to the other points in the case.

The facts of the case are very short and simple. It appears that the appellant, and the respondent, and others, were engaged in a distillery; that in the course of certain illegal transactions which took place in the conduct of this distillery by Alexander Campbell and others, who had managed the business, the parties were guilty of an infraction of the revenue laws, by which the whole company (including the pursuer as a partner, though absent and ignorant,) became liable to certain penalties. It appears that a prosecution having been commenced by the law officers of the crown against the company to recover these penalties, Alexander Campbell agreed that it would be expedient to make an arrangement with the officers of the crown, and to consent to a verdict for 3,000*l.* in order to stop prosecution, finding that they would be subject to a much larger sum if it proceeded. Thus arose a communication between the pursuer and Alexander Campbell; the appellant, therefore, was, in terms, distinctly a party to that arrangement. It was with his concurrence and his consent that it was done, and it was a verdict by consent. The respondent states that he became sub-

ject to pay a proportion of the sum of 3,000*l.*, and he seeks to recover from the other persons, who are those who really were guilty of the offence, an indemnity against the consequences of that verdict to which he was a party consenting.

Now it would be very strange indeed if by the law of Scotland, or the law of any other country, after such a transaction as that, a party paying the money was to be left to bear the whole burden; because the argument would equally apply to his paying the whole 3,000*l.*, and asking contribution against the others. If this objection could prevail, that because these parties were all guilty of a common offence, therefore out of such a transaction no contribution could arise, it would be an answer to him if he had paid the whole, and demanded contribution only against the other parties. But all that is entirely concluded by what has taken place in the cause, because in the progress of the cause this objection was raised by the defences, namely, that liability could arise out of this transaction.

Various opportunities occurred in the earlier stages of the cause in which the judgment of the Court might have been obtained upon this defence. Those opportunities were not taken advantage of, but ultimately an issue was directed, which embraced the whole question in the cause, the issue being, whether the defenders or any of them are indebted and resting owing to the pursuer the sum claimed, or any part thereof, with the interest thereon, as the balance of the said penalty and expences. Upon that issue the jury could not find in favour of the pursuer without at the same time finding against the defender upon this question. They could not find that the defenders were owing any sums

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of money to the pursuer in respect of this transaction, without finding that the transactions were such as to give rise to their liability. It was therefore perfectly competent to the defender to raise the question before the jury, (through the intervention of the judge, it being a point of law,) whether the transaction were such as would preclude the pursuer from any title to ask, against the defenders, any contribution in respect of the sums he had paid. That would have been done by taking the opinion of the judge, and if the judge gave an opinion contrary to what the defenders conceived to be the proper state of the law, they had an opportunity of bringing that judgment before the Court by a bill of exceptions. It appears that no such course was taken, and the jury found a verdict in favour of the pursuer on both issues, establishing the fact that the pursuer was ignorant of the transaction, and establishing the fact that the defenders were indebted to him on account of the transaction in a certain sum.

Then the appellant, one of those defenders, takes this course: he applies for a new trial. A new trial is refused; then comes an application to the Court of Session to apply the verdict; that is to say, to give judgment conformably to that which the jury had found. Then, at all events, according to the argument at the bar, it was competent to the appellant to show, that notwithstanding the verdict there were objections to the Court proceeding to give judgment to enforce the liability of the defenders to the indemnity of the pursuer. But what the appellant himself states that he did in consequence of this notice was, that he again unsuccessfully endeavoured to convince the Court that the verdict should not be applied, upon the ground

that it was not sustainable in law. But that had already been decided upon the motion for a new trial; and if he ever had a case for questioning that decision in point of law he had not taken the opportunity to do so, because he had not called upon the judge to state any opinion upon that point. Of course that met with the same result which the motion for a new trial had met with. The Court pronounced judgment in favour of the pursuer.

Now again, at your Lordships bar, (all the opportunities of raising the questions, if the questions were at all sustainable, having been omitted at the proper period in the course of the proceedings in the Court of Session,) the same argument is again raised. I do not say that the parties would be absolutely precluded yet, if the record came here in a state which would allow the question to be raised. But your Lordships are now called upon to deal with a record, of which the verdict of a jury forms part, taken under circumstances which preclude the defenders from questioning it. The question, therefore, is, not whether there is before this House any ground upon which the Court of Session ought to have refused to give effect to that verdict, but whether that verdict is now to be set aside altogether,—the whole matter having come before the jury, the jury having found a verdict, and the appellant having been in a situation in which he cannot question the finding of that verdict. It is therefore quite unnecessary to consider whether there be a distinction in the law of Scotland, as compared with the law of England, upon that subject, because after that which has taken place no question can arise. The case here is, not that the parties, having been jointly guilty of the offence, a joint liability is

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endeavoured to be raised out of those transactions, but it is that the partnership having agreed among themselves to pay a certain sum to relieve themselves from that liability, upon that contract between themselves one party seeks for contribution and indemnity against the others. It is unnecessary to go into that question, because I consider it to have been entirely precluded by the course adopted below.

That exhausts the whole of the appellant's case, as it appears in the printed papers. But then it is said, that although that might be so, yet there is an inconsistency between the judgment which the Court pronounced and the verdict which the jury returned, inasmuch as the jury found that the defenders are indebted and resting owing to the pursuer a certain sum, with interest thereon as libelled; whereas the judgment was that they were jointly and severally liable. I do not make any observations upon that which is not before your Lordships, namely, upon a case which might possibly have occurred, in which the judgment might have appeared to be inconsistent with the verdict. There is no inconsistency, in the way in which I construe the language, between the judgment and the verdict; and I think your Lordships will not be very astute, in construing the terms of the verdict, to find out expressions, and to give effect to expressions out of their natural meaning, for the purpose of defeating the obvious justice of the case. The summons claimed against these defenders jointly and severally, that they owed a certain sum with interest. The jury find that the defenders are indebted and resting owing to the pursuer the sum 1,059*l.* 5*s.* 1*d.*, with interest as libelled. Now, if the words as libelled applied to the whole of the finding,

there can be no inconsistency between the verdict and the judgment, because as libelled it was a joint and several liability, and instead of repeating those words in the terms of the finding the verdict of the jury had reference to the terms of the libel in which the joint and several liability is claimed.

But it is not necessary entirely to rest the case upon that, because when the jury find that the defenders are liable, is it inconsistent to say they are jointly and severally liable? are they less liable because they are severally liable? The verdict is, that they are liable. It remained for the Court to adjudicate upon the extent of the liability as ascertained by the verdict. Supposing the words "as libelled" not to apply to the whole, the sentence would find them liable, but would not discriminate whether they were liable jointly, or whether they were liable jointly and severally. When the case comes before the Court, the Court has this fact found by the jury, namely, that there is a liability. The Court then looks at the case as made in the pleadings, and awards judgment in the terms of the libel, namely, that they are severally as well as jointly liable. Now who is it that objects to it? Why Alexander Campbell himself, the author of the mischief, because he was the very party who agreed that a verdict should be given to the Crown for the sum of 3,000*l*. Yet he is the party now heard to object that he ought not to be individually liable to repay to the respondent that which the jury found the respondent is entitled to receive. There is nothing in the facts of the case that would call upon the Court to confine the liability of Alexander Campbell to a joint liability with the others. I see nothing in the terms of the verdict inconsistent with that which the

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Court have done, and what they have done is entirely consistent with the terms in which the relief was asked by the summons. I apprehend, therefore, there is nothing in this latter objection, and that upon the facts of the case it is beyond all doubt that this is an appeal which ought never to have been brought to your Lordships bar. I therefore propose to your Lordships to dismiss this appeal with costs.

Mr. ANDERSON, for the appellant, submitted that costs ought not to include the costs of the two petitions by the respondent against the competency of the appeal, which had been refused.[1]

LORD ADVOCATE.—Costs of unsuccessfully resisting as incompetent an appeal afterwards dismissed on the merits had been allowed in Gray v. Forbes, House of Lords, 13th June 1839[2], but in that case, no doubt, there had been a reservation of the question of costs in discussing the competency, which had been overlooked.

LORD CHANCELLOR.—Unless there be a reservation of the question of costs the House never allows costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant:

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[1] M'L. & Rob. 387. [2] Ibid. 530, 546.

And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

W. S. GRUBBE—MACDOUGALL and UPTON, Solicitors.

[*2d March* 1840.]

(No. 2.) ADAM GIBSON, Appellant.

[*Lord Advocate* (*Rutherfurd*) — *James Anderson.*]

HUGH ROSE Ross and others, Managers and Directors of Tain Academy, Respondents.

[*Attorney General* (*Campbell*) — *Sir W. Follett.*]

Schoolmaster.—Held (affirming the judgment of the Court of Session), that although a private body of subscribers to an academy may have obtained a charter of incorporation, a teacher appointed by them is not to be regarded as a public officer holding his situation ad vitam aut culpam.

2D DIVISION.

Lord Ordinary Jeffrey.

Statement.

IN the years 1808 and 1809 a number of gentlemen connected with the North of Scotland formed themselves into an association for the purpose of establishing and endowing an academy at Tain. They obtained a charter from the crown, constituting certain parties ex-officiis, and a certain number of subscribers (to be chosen in the manner therein prescribed), a body corporate, with the usual privileges, under the title of "Managers and Directors of the Tain Academy." Power was given to the directors (seven of whom are declared a quorum, and all questions to be determined by ballot,) to hold three meetings annually, in July, October, and December, and to the subscribers to hold an annual meeting on 30th of April. The charter also confers

[1] Rep. 16 D., B., & M., 301; Fac. Col. 23d Dec. 1837.

on the subscribers "full power to make such bye-laws "as they or the majority present at such meeting shall "judge proper and think necessary for the better "government of the academy."

The building and other arrangements of the academy were completed in 1812, and an advertisement for teachers, viz., a rector with a salary of 90*l.*, and other masters with salaries of 80*l.*, was inserted in the newspapers. At a meeting of directors on 13th October 1812 a draft of certain bye-laws was approved of; but before finally deciding thereon, one of the directors was instructed to correspond with persons versed in such regulations as to the adoption of additions or alterations; and the regulations so altered, on being laid before another meeting of directors, were then to be acted upon as interim laws, until the general meeting in April. One of these proposed bye-laws was as follows:—"That "if any of the teachers shall be found, after due inquiry "by the directors, to be unsuccessful, or in other re-"spects unworthy of the trust reposed in him, it shall "be always competent to the directors to deprive such "teacher of his office, and of all the emoluments con-"nected with it."

In December 1812, the appellant Gibson, then head-master of the grammar school of Forfar, was chosen second or classical master of the Tain Academy. The secretary then, by order of the directors, intimated to the several teachers their appointments, and that if found qualified on examination by the professors of the Edinburgh University they should be entitled to the fees and emoluments of their situations, as the same are fixed by the directors, but subject always to the rules and regulations adopted by the directors for the govern-

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ment and management of the institution, as well as the bye-laws which the directors have laid down for the internal regulation of the institution.

On 15th February 1813 the academy was opened; on which occasion the directors publicly stated to the teachers the different bye-laws which it had been thought necessary to make in the meantime for their regulation.

On 30th April 1813, the day appointed by the charter for the election of directors, advertisement thereof having been made in the Inverness newspaper, the meeting of subscribers unanimously adopted certain bye-laws which the secretary intimated had undergone the revision of the teachers, and appointed them to be the standing regulations of the academy. Of these regulations the 6th was as follows:—"In case it shall "be found necessary to discontinue any of the teachers, "which can only be done by a special meeting of the "directors, regularly called for the purpose by their "preses for the time being, it is understood and de-"clared that such teacher shall receive three months "previous notice of such intention, before his services "are declared at an end." The regulations above-mentioned were subsequently acted upon and recognised by all parties concerned.

For many years after his appointment, the appellant taught Latin and Greek and also French, to the satisfaction of the subscribers and directors of the academy. Certain disputes afterwards arose betwixt the parties, which led to the appellant's dismissal. The proceedings of the directors, by which they attempted to accomplish that object, formed the subject of various summary applications by the appellant to the Court of Session, and the sentence of dismissal was suspended, on the

ground of certain technical objections to the regularity of the proceedings.

Thereafter, proceedings for that purpose being adopted of new, a meeting took place on the 1st August 1837, at which the directors, being a quorum of seven, including the sheriff-substitute of Ross, an ex-officio director, unanimously "discontinued Gibson as a teacher in the "academy; dismissed him from the said office; and "declared his services at an end." Of this sentence Gibson brought a suspension. Answers having been lodged, the Lord Ordinary reported the cause to the Court, adding to his interlocutor the subjoined note [1]:—

[1] "*Note.* — As this case has been matured in various previous discus- "sions, and is fully argued in the Bill and Answers, the Lord Ordinary "thinks it for the interest of both parties that the merits should now be "disposed of, if possible, by a judgment of the Inner House, by which, "though issued only from the Bill Chamber, the whole matter in dispute "may probably be practically settled.

"If he had been to give his own judgment in this stage of the pro- "ceeding, it would have been for passing the Bill; not, however, because "he had made up his mind judicially that the letters ought to be sus- "pended simpliciter, but because he was not so satisfied of the reverse as "to justify him in precluding the complainer from taking the opinion of "the Court on the question, by refusing the Bill.

"If a single judge sitting in the Bill Chamber entertains any serious "doubt as to a question which must eventually go to the Inner House, "it is conceived to be his duty, generally, to pass the Bill; and even "where, from the fulness of the argument, or such other circumstances "as occur in the present case, there is reason to expect that an autho- "ritative opinion on the merits may be more speedily obtained by report- "ing the Bill and Answers, it is apprehended that he may be equally "justified in following such a course by the existence of such a doubt, "and equally excused from individually forming any positive opinion on "the merits.

"There are several points in the complainer's argument which he "conceives to be untenable, and some which appear to be pressed with "no great discretion. But others raise questions of difficulty. On the "whole, the Lord Ordinary is of opinion that the complainer was bound "by the bye law relied on by the respondents, if that bye law was duly "enacted in terms of the charter. But he has doubts whether it was so

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Statement.

Judgment of Court, 23d Dec. 1837.

On the bill and answers being reported, the cause came before the Judges of the Second Division, when their Lordships pronounced the following judgment: "The "Lords, having advised this bill, with the answers and "productions, and heard counsel for the parties, on "report of Lord Jeffrey, Ordinary, refuse the bill, and "recall the interdict."

"enacted. The charter distinctly requires, not only that all bye laws "shall be adopted only at the annual meetings on 30th April, but that "previous notice of the intention then to propose them shall be given "'by public advertisement in the London and Edinburgh newspapers, "'one month at least previous to such annual meeting;' and it is under- "stood to be admitted that no such notice was given as to the bye laws "now in question: and whether the effect of this omission can be held "obviated, either by the alleged compact with the teachers, or the sub- "stantial iteration and homologation of the law, by its publication and "recital without objection at various advertised meetings for twenty-five "years ensuing, is a question deserving perhaps of more serious attention "than the respondents have been pleased to bestow on it.

"The main grounds, however, on which he would have been induced to "pass the bill, are, 1st, that the bye law itself only empowers the directors "to remove a teacher, 'in case it shall be found necessary' so to do, "which does seem to be something different from a power to remove "whenever they may think proper, or, in short, at their pleasure; while, "if a necessity (moral necessity of course) is required to justify the "measure, it is difficult to suppose that its existence should be held "proved by their mere allegation, and without allowing the party most "interested to disprove its reality; and, 2d, that the opinions given in "the case of Inverness in 1815 do give so much countenance to the "argument maintained by the complainer as to make it fitting that it "should not be rejected in a case so nearly analogous, without the "gravest consideration. The Lord Ordinary is also a good deal moved "in this question of the construction or legal application of the bye law, "by the variance of the terms in which it is expressed in the original "draft, enacted ad interim on 14th October 1812, and those in which it "is finally adopted on 30th April thereafter. In the former, it is pro- "vided that a teacher may be removed, not only if found 'on inquiry by "'the directors' to be unworthy of trust, but also if he be unsuccessful; "whereas in the latter he is only to be so dealt with 'in case it shall be "found necessary,' which really appears to be quite as strong an expres- "sion as that in the Inverness case, where the power was generally 'to "'dismiss any of the teachers on proper grounds.' It is difficult to "conceive that it can ever be necessary to dismiss a teacher, unless there "are proper grounds for his dismissal. (Signed) F. J."

The suspender appealed.

Appellant.—It is settled law that, in the case of a burgh or parochial schoolmaster, the masters are appointed ad vitam aut culpam, and cannot be arbitrarily dismissed, without sufficient cause duly proved. That rule is founded on public policy, and the necessity of giving permanency to an appointment, held for the advantage of the public. On the other hand, in a mere private school, clearly the proprietors or managers have a power of dismissing the teachers at pleasure. Under the first head are the cases of the Magistrates of Montrose v. Strachan, 18th June 1710[1], and Kempt v. Magistrates of Irvine, in 1697 and 1699[2]; and the case of Farish v. Magistrates of Annan[3] illustrates the official permanency of a public officer, such as a town clerk. Under the head of teachers of private schools is the case of Mason v. Scott's Trustees, 23d January 1836[4], which was, as the Lord Ordinary (Moncreiff) held, a private school, "dependent on a private trust, "by the terms of which it is altogether at the discretion "of the trustees in what manner they may choose to "manage it."

Incorporated schools, however, founded on charters from the Crown, such as the academies of Ayr, Inverness, and Tain, clearly come under the denomination of public schools; and the teachers in such are entitled to all the immunities of burgh and parochial schoolmasters; and such was the result of the decisions in the case of A. B. v. Directors of Ayr Academy, 3d June

[1] Mor. 13,118, and Fount.
[2] Mor. 13,136.
[3] 2 Sh. & M'L., 930.
[4] 14 D., B., & M., 343.

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1825[1], where, although the directors were found entitled to dismiss the rector on cause shown, it was one of the regulations that the rector should be bound to abide by the judgment of the directors, which should be final; and, in the case of Adam v. Directors of Inverness Academy, decided in 1815[2], where the directors of the Inverness academy, incorporated by Crown charter with the parochial school, with power to dismiss any of the teachers "on proper grounds," had been held not entitled to dismiss a teacher at pleasure, and without inquiry and proof. So in the present case, which was analagous to that of Inverness, unless it had been "found necessary" by the Court competent to decide in such a matter, there was no arbitrary power to dismiss. [LORD CHANCELLOR.—It is admitted, that in the case of a private unincorporated school there is a power of dismissal. Now does the fact of being incorporated make a difference? Or, is there any case drawing a line between a mere private school and an incorporated academy?] It is admitted there is no case; but in principle the line is drawn by holding the teacher of a school, publicly sanctioned by act of incorporation, to be a public officer; and the Inverness case is an illustration. [LORD CHANCELLOR.—That went on the terms of the charter.] Farther, if the bye-law was duly enacted, it is repugnant and contrary to law; but the appellant disputes the power of the directors so to enact, and the formality of their procedure in that respect.

The respondents counsel were not called on.

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[1] 4 S. & D. 63 (new ed.), 65. [2] Note in 14 D., B., & M., 714.

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LORD CHANCELLOR.—If your Lordships have no doubt, upon the appellant's own statement, that the Court below came to a correct conclusion, it would be but a matter of injustice to allow the parties to go on with any further proceedings. The case is that of a schoolmaster appointed by certain individuals to take charge of a school. Those individuals having met together, determined that a school should be instituted; and they thought it for the advantage of the undertaking that they should obtain a charter of incorporation, and that charter accordingly incorporated the individuals who had associated for the purpose of founding this school, and those who might come afterwards into their place. But the association still remained entirely of a private nature; it was founded and maintained by private means, and the members of the corporation were those who contributed to the support of the school.

Now it has been decided in several cases, that where individuals establish a school from private funds, the regulations which apply to schools that are considered public do not apply. A public schoolmaster is a public officer, and he cannot be dismissed any more than any other officer without cause. That is the ground of the decisions of Courts in the cases of public schoolmasters. It is clear, however, that in a private trust this rule cannot apply. In the course of the argument I asked the counsel whether there was any line drawn in the law of Scotland between a private establishment, the members of which had been incorporated, and those private establishments the members of which were not incorporated, and they very properly answered that there had been no case recognizing any line of distinction

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existing between the two. We must take it then that the distinction has never been adopted. If so, I am sure that your Lordships will not now introduce it for the first time. Nothing could be more destructive to the interests of private establishments than that persons holding subordinate situations in them should be considered like public officers, and treated as having freeholds in their offices. They who assert that such is the case have the burden thrown on them of showing it to be so in law.

There are many cases in which it may not be expedient for the interest of the public that a man should continue to hold a situation, and yet no one may be able to show a sufficient cause for his dismissal. He may take great pains with his scholars, but he may not be successful in teaching them. This want of success might be a good reason for removing him, and yet, without showing something wrong in his conduct, it would not afford a reason, in a court of justice, for his dismissal. In the case of a public school, the master being an officer, the inconvenience must be submitted to, but that inconvenience should not be extended to an establishment of a private nature.

On referring to the provisions of the charter of this incorporation, it appears that the powers given to the parties are very large. They are to appoint a treasurer and other necessary officers, and to have a common seal; and "full powers" are given "to the fellows of "the said society, and to their successors, at their gene- "ral meetings, to make such other and so many private "laws, constitutions, orders, and ordinances as shall by "them, or the major part of them, who shall be present "at such meetings, be judged proper, and shall be

"thought necessary for the better government and "direction of the said academy." So far, therefore, they have the most unlimited discretion. There is then a clause as to the teachers, "that the teachers shall con- "sist of a rector and an assistant, and that the patron- "age of the academy shall for ever remain in the sub- "scribers and their heirs, who are to meet every year, "and examine the state of the funds, and to fill up "vacancies in the teachers (if there are any), and in "general to give their orders respecting what may "appear necessary to be done for the good of the insti- "tution." The powers therefore given are as large and ample as language can be made to express.

My Lords, it appears that upon its being proposed that this gentleman, the present appellant, should become a candidate for the office of master, there were communicated to him (that is not in dispute) certain excerpts from minutes of the directors of the 16th of December 1812, and that amongst others was this minute:—"And the meeting request of their secretary to inform the different gentlemen above mentioned," of whom he Adam Gibson was one that was found qualified, "of their election," &c. (His Lordship quoted this order and the sixth bye-law.) That was communicated to the master, Mr. Gibson, the present appellant, previously to his accepting the office, and the bye-law passed on the 30th of April was in the very terms of that communication. Now it seems to me to be very immaterial—those facts being established between the parties—whether that bye-law was advertised in the newspapers or not, because the party accepted the office under the terms stipulated in that proposed law, which was regularly enacted into a bye-law on the 30th of

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April following, in the very same terms; those were clearly the conditions on which he accepted the office.

My Lords, when we find that the charter itself leaves the managers of this institution at liberty to make such laws and regulations as they may think fit for the better management of the academy; when we find that they, by a bye-law of their own, limit the power which that charter gives them, because the bye-law introduces a regulation in some degree restricting the authority which the charter conferred upon them, is it possible, in putting a construction upon this bye-law, to hold that any other persons were to be judges of the necessity of removing this master but those who made the bye-law? Instead of considering this as a bye-law which is liable to objection, as exceeding the powers of those who made it, it must be regarded simply as part of the contract between the directors and the masters, creating a restriction upon the power which, by the charter, they unquestionably had a right to exercise.

Under those circumstances the present appellant becomes a master at this academy, and at a meeting regularly convened by a notice for that purpose the directors discontinue him. Whether they were right or wrong—whether they were acting from pure or impure motives—it is not for your Lordships to inquire into. If they exercised a legal right in doing the act now in question, there is no reason in these proceedings to interfere with the exercise of that legal right.

My Lords, cases have been referred to which seem to me to leave no doubt upon the point. I find it clearly established in the cases quoted at the bar that a private society has the right which was exercised here; and there is no difference between this and a private society,

though they have been incorporated. If the charter had interposed any restriction, the grantees might be considered as having entered into a contract with the Crown to exercise certain rights within certain limits. That was the Inverness case. The charter did not give the directors the power of dismissing the schoolmaster, except for good reasons; and if any party is restricted from doing an act, except for cause shown or reasons assigned, there must be some jurisdiction competent to exercise its judgment as to whether the reasons assigned be valid reasons or not. Here the charter contains no such restriction; it gives the most unqualified power to the directors to make such rules and regulations as they may think fit; and the bye-laws they make give them discretionary power, at a certain meeting, of dismissing the schoolmaster.

The cases of parochial schools seem to be admitted to have no application to the present case. The rule established for parochial schools is one which ought to be established in all schools that partake of the nature of public schools. In the Inverness case the judgment proceeded upon the ground that the charter limited the powers of the directors, and confined them to dismissing a schoolmaster for reason assigned. The Court of Session said, if that be so, we must be the judges of the reasons. Although there is no case directly in point, I think your Lordships will find in the case of Ayr there was a corporation, and they laid down certain rules under which the directors were at liberty to dismiss the master appointed. They had laid down rules for the appointment of a master; that master had been discontinued, and another master was appointed in his place; and one question in the cause was, whether

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the master who had been so secondly appointed came into his office under the same terms which had been laid down regulating the appointment of his predecessor. It was considered that he accepted his office under those terms, and that those conditions were binding upon him. It seems to be established in the language of the Ayr case, that if the office of a schoolmaster is of the nature of a public office he holds his office during life or during good behaviour; and that it is not competent to those who manage such schools to alter the tenure of the office, and make him enter into a contract to hold it during pleasure. But the case of Mason v. Scott's trustees[1] established that in private charities that rule is not applied.

There being nothing here in the nature of a public office, and the schoolmaster having accepted his trust upon the conditions of that bye-law, which, instead of being an enlargement, was a restriction upon the power of the corporation, it does not appear to me that there is any thing stated to induce your Lordships to doubt that the directors had by the constitution of the establishment which was under their management, and by the law under which they were acting, the power to dismiss the individual now appealing to your Lordships.

Of three judges present at the time the argument in this cause took place below, it appears that one of them, the Lord Justice Clerk, thought that the bill ought to have been permitted to pass, but without expressing any decided opinion as to the ultimate issue of the case; his Lordship seems to me to have proceeded

[1] Ante, p. 21.

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upon what had previously taken place. Now it does not appear to me that it is a legitimate ground for judgment that there has been litigation and considerable error in the previous proceedings. The question is, whether this proceeding is correct which is complained of; whether the former proceedings have been in error, or have occasioned expense, does not appear to me to be a ground upon which the judgment ought to proceed in this case. Therefore, under these circumstances, it is unnecessary that the time of your Lordships should be occupied upon any further discussion in affirming the interlocutor appealed from, unless the learned counsel for the respondents should wish to say something upon the subject of costs. At present I should be inclined to advise your Lordships to affirm it without costs.

Sir *W. Follett.* —We have no wish, my Lords, to press for costs against the appellant in this case. We made no such application in the Court below, and we have no wish here to make the application.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed.

G. and T. WEBSTER — SPOTTISWOODE and ROBERTSON, Solicitors.

[*2d March* 1840.]

(No. 3.) CHARLES TENNANT and Company, the St. Rollox Shipping Company, and WILLIAM SLOAN, as Agent for the said Shipping Company, as an Individual, and as Agent for other Vessels employed in navigating the Forth and Clyde Canal, Appellants.[1]

[*Pemberton — James Anderson.*]

The COMPANY of PROPRIETORS of the FORTH and CLYDE NAVIGATION, Respondents.

[*Lord Advocate* (*Rutherfurd*) — *Sir W. Follett.*]

Statutes 8 *Geo.* 3. *c.* 63., *and other Statutes, to* 1 *Geo.* 4. *c.* 48. (*Forth and Clyde Navigation Acts*), *Construction of.* — Held, construing the above statutes (affirming the judgment of the Court of Session, adhering to the Lord Ordinary's interlocutor,) that the Canal Company are not bound to deepen and enlarge the Forth and Clyde Canal, or any part of it, to the depth of ten feet, and that they are not bound to alter, enlarge, and deepen that part of the said canal extending from Port Dundas to St. Rollox Works, "so as to be of the same depth and dimensions "with the remainder of the collateral cut, and of the "other parts of the main canal."

1st DIVISION.

Lord Ordinary Fullerton.

Statement.

BY the statute 8 Geo. 3. c. 63. the respondents were incorporated into a company, under the name of "The "Company of Proprietors of the Forth and Clyde "Navigation." The act proceeds upon the pream-

[1] 16 D., B., & M., 347.

ble that "whereas the making a navigable cut or "canal from the frith or river of Forth, at or near "the mouth of the river of Carron in the county of "Stirling, to the frith or river of Clyde at or near a "place called Dalmuir Burnfoot, in the county of "Dumbarton, with a collateral cut or canal to the city "of Glasgow, will open an easy communication be- "tween the friths of Forth and Clyde, as also "between the interior parts of the country." The company were by the 1st section "authorized and em- "powered to make and complete a cut or canal of "seven feet depth of water, navigable and passable for "boats, barges, and other vessels, from the frith or "river of Forth, at or near the mouth of the river of "Carron, passing on the north side of the house and "offices of Kerse, through or near Bainsford, to or near "Bonnymill, to or near Bankiermill in the county of "Stirling, to and through Dollator Bog, to or near "Inchbelly Bridge, to or near Calder Bridge, passing "betwixt Kilmardinny-hill and Beauclair, to or near "Saint Germain's Loch, and betwixt Clobey-hill, and "the hill of Bladardy, to or near Three-part-mill- "dam, and to the frith or river of Clyde at or near "a place called Dalmuir Burnfoot; and the said col- "lateral cut of seven feet depth of water from the said "main canal, at or near a place called Bladardy, "through or near Partick, across the river Kelvin, "to the city of Glasgow aforesaid."

By the 28th section it was enacted that "to the end "that the said company of proprietors may be fur- "ther enabled to carry on so useful an undertaking," the said company of proprietors, "their successors "and assigns, may lawfully raise and contribute

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"among themselves, and in such proportions as to "them shall seem meet and convenient, a competent "sum of money for making and completing the said "navigable cut or canal and collateral cut, provided "that the sum does not exceed 150,000*l.* sterling money "in the whole, except as therein after-mentioned;" and, by the 30th section, that in case the "said sum "of 150,000*l.* sterling money, herein-before authorized "to be raised, shall be found insufficient for the "making, completing, and maintaining the said navi- "gable cut or canal and collateral cut, and other the "works hereby authorized to be made, and all neces- "sary charges and expenses relating thereto, then and "in such case it shall and may be lawful to and for the "said company of proprietors to raise an additional "sum of 50,000*l.*"

By section 46. it was enacted, that, "in conside- "ration of the great charges and expenses which the "said company, their successors and assigns, will be "at in making, maintaining, and supplying with water "the said cut or canal and collateral cut, and in "making and maintaining all the other works hereby "authorized to be made and erected, it shall and may "be lawful to and for the said company, their suc- "cessors and assigns, from time to time and at all "times hereafter, to ask, and demand, take, and re- "cover, to and for their own proper use and behoof, "for tonnage and wharfage," "not exceeding the sum "of two-pence sterling per mile for every ton of iron," "&c., "and other goods," &c., "which shall be navi- "gated, carried, and conveyed upon and through the "said cut and canal or collateral cut, and so in pro- "portion for any greater or less quantity than a ton."

And by other sections it was declared, that the rates and duties exigible for light boats, and other vessels without a loading or in ballast, should not exceed one penny per mile for every ton burden; and that lime and limestone should not pay more than one fourth, and ironstone more than one half, of the above-mentioned rates of toll; and full powers were granted to the company of proprietors to fix the amount of these rates in the manner therein prescribed, and with a view either to their reduction or subsequent advance, but always with and under the condition that they should not exceed the highest rate therein allowed.

It was provided by section 58, under certain qualifications, that if the distribution among the proprietors out of the profits of the canal should exceed the rate of ten per cent. upon the subscribed capital, then the rates, tolls, and duties should thereafter be made proportionably lower.

In the course of this undertaking, it became advisable to change the original line both of the canal and collateral cut; and the statute 14 Geo. 3. c. 62. was passed, which proceeds upon the preamble, that it would be much more beneficial to discontinue the course or track of the canal and collateral cut authorized and directed by the above-recited statute, and instead thereof, to carry "the said cut or canal "from Dollator Bog, the summit or point of partition "aforesaid, to the frith or river of Clyde, at or near "Dalmuir Burnfoot, by or near Inchbelly Bridge, to "or near Easter Calder, to or near Calder church, to "or near Clober-hill, to or near Bladardy-hill, and to "or near Three-part-mill-dam; and the said collateral "cut from the said main canal passing by Stocking-

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" field, to or near a place called Thumblefield, to or " near Cowcaddens, and to or near the townhead of the " city of Glasgow;" and " authorizes and empowers" the company to continue, make, and complete, the main canal in the direction above pointed out, and " the collateral cut from the said main canal, passing by " Stockingfield, to or near a place called Thumblefield, " to or near Cowcaddens, and to or near the townhead " of the city of Glasgow."

By the statute 13 Geo. 3. c. 104. the company was empowered to borrow a sum not exceeding 70,000*l.* on the credit of the navigation, and to assign the tolls, rates, and duties in security thereof; and it was therein expressly provided, sect. 5., that the money so to be borrowed should be applied " in making, maintaining, and " completing the navigable cut and canal, and collateral " cut, and other works authorized by the two before- " recited acts to be made, and in carrying the several " powers, provisions, and authorities therein and herein " contained into effectual execution, so far as relate " to the navigable cut or canal from the frith or river " of Forth to the frith or river of Clyde, and to the " collateral cut from the same to the city of Glasgow, " and to no other use or purpose whatsoever."

In 1775 the main line of the canal was completed from the Forth to or near Stockingfield, and in 1777 the collateral cut was brought past Stockingfield to Hamilton-hill, which is within the liberties of the city of Glasgow, and there a basin was formed, which became the canal harbour of Glasgow till 1790.

The statute 24 Geo. 3. c. 57., passed in the year 1784, set forth, that " whereas the eastern branch of the said " canal, from the river Forth to a place called the Stock-

" ingfield, and the collateral cut from thence to the city " of Glasgow or neighbourhood thereof, were com- " pleted several years ago;" and after narrating that the sums borrowed by the company had been expended, and that a considerable debt had been contracted, authorized the Barons of Exchequer to advance 50,000*l.* towards completing the works, on condition that, when the debts should be paid off, government should draw dividends along with the proprietors, in proportion to the stock of 50,000*l.* they held in the company.

The statute 27 Geo. 3. c. 55., passed in the year 1787, recited the 11 Geo. 3. c. 62., and narrated that the main cut or " canal has been carried on to Stocking- " field, and the collateral cut has been finished as far as " or near to the townhead of the city of Glasgow;" and it enacts, section 2., " that the said company of pro- " prietors, their successors and assigns, shall be and they " are hereby authorized and empowered, by themselves, " their deputies, agents, officers, workmen, servants, and " assigns, to make and complete the said main cut or " canal and collateral cut, as far as the same are " already finished, of such depth of water as shall be " equal to eight feet at least in every part thereof, " navigable and passable for boats, barges, and other " vessels." And power and authority is granted to them to raise the banks of that part of the said main canal and collateral cut which has been finished, and otherwise to do and perform what they shall judge necessary to make the same of the depth of water of eight feet at least. The main line as well as the collateral cut terminating at Hamilton-hill were accordingly made of the depth of eight feet.

With a view to a more adequate supply of water for

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the Forth and Clyde canal, an agreement was entered into betwixt the company of proprietors and the proprietors of the Monkland Canal, (the western extremity of which last was about a mile and a half to the east of the collateral cut,) whereby it was agreed, "that the "company of proprietors of the Great Canal shall, at "their own expense, form a junction of the Monkland "and Great Canals, by a canal of the same size and "depth with the Monkland Canal to join the Great "Canal, in such manner and at such place as to the "proprietors of the Great Canal may appear most "advisable and expedient."

A joint act of parliament was applied for by the proprietors of the two canals. This new act, the 30 Geo. 3. c. 73., intituled "An Act for forming a junction be-"tween the Forth and Clyde Navigation and the "Monkland Navigation, and for altering, enlarging, "and explaining several former acts passed for making "and maintaining the said navigations," proceeds on the preamble and representation, inter alia, that under the powers conferred by the statute 8 Geo. 3. "the "main line of the Forth and Clyde Navigation is now "nearly finished, and a collateral cut is made from the "same to a place called Hamilton-hill, within the dis-"tance of a mile or thereabouts from the city of "Glasgow:" that the aforesaid two companies were "desirous to have a junction formed between the said "two canals, and that it would be highly beneficial to "the public at large if the company of proprietors of "the Forth and Clyde Navigation were empowered to "carry on their collateral cut from Hamilton-hill to "the west end of the Monkland Canal, at or near the "townhead of the city of Glasgow, and were enabled

" to purchase lands for the purpose of making an " harbour and basin at or near a place called Hun- " dred-acre-hill, and for the purpose of building " houses and warehouses for the accommodation of " merchants and others resorting thereto, and were also " enabled to make and lay out roads, lanes, and pas- " sages leading from the same to the city of Glasgow." It is then enacted, section 1., " that from and after " the passing of this act it shall and may be lawful to " and for the said company of proprietors of the Forth " and Clyde Navigation, their successors and assigns, " and they are hereby authorized and empowered, by " themselves, their deputies, agents, officers, workmen, " servants, and assigns, to complete and finish the said " collateral cut or canal of such depth of water as shall " be equal to eight feet at least in every part thereof, " navigable and passable for boats, barges, and other " vessels, from the aforesaid place called Hamilton-hill " to or near a place called Hundred-acre-hill, and from " thence by a canal not exceeding the above dimen- " sions, and navigable and passable as aforesaid, to the " west end of the Monkland Canal, at or near the " townhead of the city of Glasgow;" and by the said section of the statute, all the powers, privileges, and authorities granted by the previous acts were extended to, and were declared to remain in full force and effect, and to be exercised and enjoyed by the said company of proprietors of the Forth and Clyde Navigation, so as " to complete the said collateral cut or canal, of the " dimensions aforesaid, by the line herein described, " from Hamilton-hill aforesaid to the west end of the " Monkland Canal, or at or near the townhead of the " city of Glasgow." Section 2. provides that all the

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powers, privileges, and authorities granted to the Forth and Clyde Navigation Company by the previous acts, in regard to making reservoirs, "levying tolls, and for all "other purposes respecting or in any ways relating to "the main cut or canal or collateral cut therein men- "tioned, shall be extended to, and shall remain and "be construed to remain in full force and effect, and "shall be exercised and enjoyed by the said company "of proprietors of the Forth and Clyde Navigation, "so far as the same are or may be necessary for "enabling the said company of proprietors of the "Forth and Clyde Navigation to complete the said "collateral cut or canal, of the dimensions afore- "said, by the line herein described, from Hamilton- "hill aforesaid to the west end of the Monkland Canal, "at or near the townhead of the city of Glasgow."

By virtue of the 30 Geo. 3. c. 73. the collateral cut was extended to Hundred-acre-hill (now called Port Dundas), and junction effected by means of a canal continued onwards to the west end of the Monkland Canal.

By the statute 39 Geo. 3. c. 71., which proceeds upon the preamble, "that the said company having "completed the said navigation, whereby a safe and "easy communication is opened from the east to the "west sea, and having discharged all the debts con- "tracted in carrying on their works," the company were empowered to redeem from the Exchequer the shares held by the government in the canal under the act 24 Geo. 3. c. 57.; and the outlay or sums actually expended by the company were accumulated into a capital stock of 421,525*l.*

The statute 46 Geo. 3. c. 120., proceeding upon the

preamble that the Forth and Clyde Navigation was then finished, enacts, section 7th, "that from and after the "passing of this act the several and respective rates "and duties granted by the before-recited acts, or any "of them, on all goods and commodities, and on light "or empty vessels, navigated or conveyed on the said "canal and collateral cut, and lying in the harbours "and basins, and on the quays and wharfs belonging "thereto, and all exemptions from the said rates and "duties, shall cease and determine, and be no longer "paid or payable or allowed, save and except as to "any arrears of the said several rates and duties which "may at the passing of this act remain unpaid, or to "any fine, penalty, or forfeiture relating thereto which "shall have been previously incurred." And in lieu of these rates and duties, it was further enacted, section 8., "that in consideration of the great charge and "expenses already incurred and to be incurred by "the said company, their successors and assigns, in "making, maintaining, and supplying with water the "said canal and collateral cut, and all the other works "therewith connected, it shall and may be lawful to "and for the said company of proprietors, their suc-"cessors and assigns, from time to time, to ask, "demand, take, and recover, to and for their own "proper use and behoof, on all goods and commo-"dities, and on light or empty vessels navigated or "conveyed on the said canal and collateral cut, and "lying in the harbours and basins, and on the quays "and wharfs belonging thereto, the following rates "and duties; that is to say, on all goods and com-"modies whatever, so navigated and conveyed, a duty "not exceeding four-pence sterling per ton per mile;"

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and also to impose a smaller duty on light vessels, therein particularly set forth.

The depth of the main line and collateral cut, as far as Port Dundas, as originally made, was eight feet, and the rest of the collateral cut, onwards to the Monkland Canal, (and now called the cut of junction,) four and a half feet.

In 1814 the act 54 Geo. 3. c. 195. was obtained, granting to the respondents permission to make certain additions to their works at Port Dundas and Grangemouth, and also containing the following provision in section 2.: "And be it further enacted, that the said "company of proprietors shall be and they are hereby "authorized and empowered," &c. "to alter, widen, "and enlarge the said canal, collateral cut, and cut of "junction, and the works thereto belonging, and to "raise the banks or sink the bed thereof, in such a "way or manner as the said company of proprietors "or the governor and council shall think fit, for "making the same ten feet depth of water in every "part thereof, navigable and passable for boats, barges, "and other vessels." The statute also contained the following provision in regard to borrowing money for these operations, section 17., "That it shall and may be "lawful to and for the said company of proprietors to "borrow and take up at interest, upon the credit of "the rates and duties granted by the said recited acts "and this act, or any or either of them, any sum or "sums of money not exceeding in the whole the sum "of 40,000*l.* sterling, for the purpose of enlarging and "extending the basin, and making new streets and "wharfs at Port Dundas; and of altering, widening, "and enlarging the said canal, collateral cut, and cut

" of junction with the Monkland Canal, and the works " thereto belonging, and raising the banks or sinking " the bed thereof for making the same ten feet depth " of water in every part thereof, or for any or either of " such purposes."

The respondents, as alleged, expended the whole money borrowed by them under the discretionary powers of the above act, partly in enlarging the harbour Port Dundas, partly in widening and deepening the cut of junction and including it in the harbour, and partly in strengthening and deepening other parts of the canal. The canal and collateral cut, as far as Port Dundas, were made nine feet deep.

The sum which the last-mentioned statute empowered the company to borrow having been expended, the respondents in 1820 obtained power to borrow the additional sum of 80,000*l.*, by statute 1 Geo. 4. c. 48., which proceeds on the preamble or declaration, that the company had " altered, widened, and enlarged the said " canal and collateral cut, and increased the depth " thereof to nine feet, and have enlarged and extended " the basin, and formed new wharfs at Port Dundas; " and in so doing, and in executing other works for " the improvement of the said navigation, since the " passing of the said act of the 39th year of the reign " of his late Majesty, have laid out and expended " various sums of money, amounting to 98,315*l.*, includ- " ing the sum of 40,000*l.* borrowed under the authority " of the said act of the 54th year of his late Majesty's " reign;" and also, " that it was just and reasonable " that the said company of proprietors should be fully " remunerated for all the money then and since ex- " pended by them in completing and improving the

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" said great national undertaking, and the works " thereto belonging: And whereas it would be highly " beneficial to the public, if the said company of pro- " prietors were empowered to borrow a farther sum of " money, to enable them to execute and carry into " complete effect the powers of the said last recited act " of the 54th year of the reign of his said late Majesty " Geo. 3. for deepening the said canal, collateral " cut, and cut of junction, to the full depth of ten " feet."

By that statute all the clauses in the former acts restricting either the amount of capital or the amount of dividend to be paid upon the capital were repealed; and it was provided that the capital stock of the company should be 519,840*l.*, and that the proprietors should be entitled to receive dividends upon it out of the revenues and profit of the said navigation, without any limitation or restriction as to amount.

By section 3. the company are authorized and empowered to borrow 80,000*l.* sterling upon the credit of the tolls, rates, and duties granted by the foresaid acts, " for making the said canal, collateral cut, and cut of " junction ten feet deep in every part thereof, as autho- " rized by the said last-recited act, and providing addi- " tional supplies of water for that purpose;" and by the 4th section it is enacted, " that the money so to be bor- " rowed, and for which such assignment shall be given " and granted, shall be applied for carrying the pur- " poses herein-before mentioned into effectual execution, " and to or for no other use or purpose whatsoever."

In December 1831 the appellants (who had previously paid the dues exacted from them, and whose works at St. Rollox are situated on the cut of junction,

and, as alleged by them, near the townhead of Glasgow,) applied for a suspension and interdict against the respondents obtaining payment of dues, and subsequently brought a summons of declarator in aid of the process of suspension; maintaining that they were not bound to pay dues until the canal company—(1), had made that part of the canal called by the respondents the junction cut of the same depth as the rest of the collateral cut; and (2), had made the whole canal, including the collateral cut and cut of junction, ten feet deep.

The conclusions of the appellants summons were, that the company of proprietors of the Forth and Clyde Navigation are bound to deepen and enlarge every part of the said canal, and to make it ten feet deep in every part thereof, navigable and passable for boats, barges, and other vessels, in the manner prescribed, and in terms of the powers and authority conferred on them, by the above-recited statutes; or, at least, to alter, enlarge, and deepen that part of the said canal extending from Port Dundas to St. Rollox Works at the townhead of Glasgow, so as to be of the same depth and dimensions, and navigable and passable for the same boats, barges, and other vessels, with the remainder of the collateral cut, and of the other parts of the main canal; and that the said canal and collateral cut, not being ten feet in depth in every part thereof, navigable and passable for boats, barges, and other vessels, the said company of proprietors have no right or title to exact the present rate of duties for the goods and commodities conveyed, or for the vessels navigated by them upon or through the said canal, and that they are not entitled to exact any higher rate of duties than those allowed by the statute

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8 Geo. 3. c. 63.; and the same being so found and declared, the said company of proprietors ought and should be decerned and ordained, by decree foresaid, to reduce the duties upon the vessels navigated, and the goods and commodities carried and conveyed upon and through the said cut or canal; and that they should be interdicted, prohibited, and discharged from asking, imposing, levying, or exacting a higher rate of duties than those allowed by the foresaid statute, 8 Geo. 3. c. 63., until it be deepened to the depth of ten feet; and, in particular, that it ought and should be found and declared, by decreet foresaid, that the portion of the said canal or collateral cut extending from Port Dundas to St. Rollox Works at the townhead of Glasgow, not being of equal depth and dimensions with the other parts of the said canal or collateral cut, and not being navigable or passable for the same boats, barges, and other vessels which navigate and pass the other parts thereof, the said company of proprietors have no right or title to impose and levy tonnage duties, or to exact the same from the appellants for the vessels navigated, and the goods and commodities carried and conveyed by them, along that portion of the said cut or canal; or, at all events, that they are not entitled to exact any higher rate of duties than those allowed by the statute 8 Geo. 3.; and the same being so found and declared, the said company of proprietors ought and should be interdicted, prohibited, and discharged from asking, imposing, levying, or exacting the duties or tolls now exigible by the present table of rates, or any other duty or toll whatsoever, for the vessels navigated and the goods and commodities conveyed upon or through the said portion of the collateral cut or canal, until it be

enlarged and deepened to the same extent with the other parts of the said canal. And there was also a conclusion for repetition of such sum as should be ascertained to be the amount of tolls and duties illegally levied or to be levied from the appellants.

The defence maintained by the respondents in the suspension and in the declarator which were afterwards conjoined was:—(1.) The history and objects of the canal, as well as the phraseology of the statutes, establish a distinction of depth between that part of the collateral cut which extends to Port Dundas, and that part of it which is now called the cut of junction; and clearly indicate, that it never was the intention of the legislature to make it imperative that the cut of junction should be made of the same depth with the other parts of the canal; while, at the same time, the act 30 Geo. 3. c. 73., which authorizes the formation of the cut of junction, extends the full powers of the previous acts for levying tolls, making them equally applicable to the collateral cut, which is therein described as extending "from Hamilton Hill "aforesaid to the west end of the Monkland Canal." (2) Although the statute 54 Geo. 3. empowered and permitted the respondents to execute certain operations, and among others to deepen the canal to ten feet, and to borrow certain sums of money for the purpose of executing these operations or either of them, it did not make it imperative on the respondents to avail themselves of these powers, or to execute these improvements, or, in particular, to deepen the canal to ten feet; but, on the application of the canal company, and on the narrative of its being for thebenefit of the company to have a power of deepening it, merely bestowed that power upon the company, to be exercised within certain

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limits according to its own discretion. (3.) The dues complained of were not granted as an equivalent for deepening the canal, but are levied under the authority of an act of parliament passed ten years before the operation of deepening was contemplated. Neither were the different legislative augmentations of the capital stock granted as an equivalent for further deepening of the canal, but, on the contrary, were merely declaratory enactments of the amount of the funds actually expended in the undertaking, and expressly granted as a reasonable indemnification for the sums so expended, and for the great loss of interest thereon. (4.) Even supposing it to have been the intention of the legislature to make it imperative on the respondents to deepen the canal to ten feet, it cannot be held to have done so under the sanction of the forfeiture or suspension of the company's right to exact dues, which they had been entitled to exact for a long course of previous years, more especially as the statutes assumed that the payment of these dues was not to be interrupted or suspended, and contained provisions founded on that assumption. (5.) The right to exact those dues having been vested in the respondents by the statute 46 Geo. 3., which has never been repealed or abrogated, either in whole or in part, the respondents could not be deprived of that power by implication, in consequence of the non-implement of any alleged obligation said to be imposed upon them by a subsequent statute; more especially where that alleged obligation is different from the consideration for which the power to levy the dues in question was granted.

The Lord Ordinary, after ordering cases, (9th July 1836) pronounced the following interlocutor:—"The "Lord Ordinary having considered the revised cases for

" the parties in these conjoined processes of declarator " and suspension, and having also considered the various " statutes referred to, finds that the defenders are not " bound to deepen and enlarge the Forth and Clyde " Canal, or any part of it, to the depth of ten feet; " finds that they are not bound to alter, enlarge, and " deepen that part of the said canal extending from " Port Dundas to St. Rollox Works, 'so as to be of " 'the same depth and dimensions with the remainder " 'of the collateral cut, and of the other parts of the " main canal;' and therefore, and in respect that the " whole other declaratory conclusions of the libel, as " well as the reasons of suspension, are founded on the " affirmative of the two preceding propositions, sustains " the defences, and assoilzies the defenders from the " whole conclusions of the declaratory action; and in " the suspension, repels the reasons of suspension, re- " fuses the interdict, and decerns; finds the defenders " and respondents entitled to expenses; allows an ac- " count thereof to be given in, and when lodged, remits " the same to the auditor to be taxed, and to report." His Lordship added the subjoined note.[1]

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[1] " *Note.*—In this case, as in many others in which a series of statutes " have been successively passed for modifying, altering, or extending the " limits and the administration of a great public undertaking, it has " happened that the expressions used in the various enactments are not " so accurately suited to each other as altogether to exclude questions of " construction founded upon nice verbal criticism; but on the present " occasion, and even giving the pursuers full benefit of all the cavils " which can be raised on the occasional inaccuracy or apparent incon- " sistency of expression in those different enactments, it does not appear " to the Lord Ordinary that there are any grounds for either of the " propositions maintained by them.

" The first in the order of the argument in the cases, though forming " the second conclusion of the libel, is that which relates to the deepening " of that part of the canal from Port Dundas to St. Rollox Works to the

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The appellants reclaimed against the Lord Ordinary's interlocutor, whereupon the Lords of the First Division

" general statutory depth of the canal. The pursuers argument on this " point is founded, 1st, on the original statutes of the 8th and 11th Geo. 3. " c. 62. and 63., enacting that the collateral cut should extend to the city " of Glasgow, or to a point at or near 'to the townhead of Glasgow;' " and, 2dly, on the assumption that the 'townhead of Glasgow' denotes " a point locally situate at or near St. Rollox Works, and farther to the " eastward than Hundred-acre Hill or Port Dundas, at which the canal, " of the general statutory depth, now terminates.

" Looking at the terms of the various statutes, the Lord Ordinary " considers this proposition to be utterly untenable. The main object of " the line of navigation was to connect the Forth and Clyde, and with " that was combined the communication between that line and the city " of Glasgow, by what was termed a collateral cut, both being of the " depth of seven feet. By the act of the 11th Geo. 3. in some respects " altering the statute of 8th Geo. 3. originally authorizing the canal, the " collateral cut was to be made 'from the said main canal, passing by " 'Stockingfield, to or near a place called Thimblefield, to or near Cow- " 'caddens, and to or near the townhead of the city of Glasgow.' The " sense attached to these last expressions appears to the Lord Ordinary " to be sufficiently ascertained, not only by the proceedings of the parties, " but by the subsequent statutes. At first the collateral cut was com- " pleted to a point called Hamilton Hill, where a basin was established " for the trade of Glasgow; and it seems to have been understood by all " parties concerned, that this was the accomplishment of the collateral " cut, as originally contemplated. Accordingly, the subsequent statutes " of 24 Geo. 3. c. 57. and 27 Geo. 3. c. 55., passed in relation to this " undertaking, expressly bear that the collateral cut from the main canal " to the city of Glasgow has been completed, the expression in the first " statute being, that it had been completed 'to the city of Glasgow, or " 'neighbourhood thereof,' and in the latter, that the collateral cut had " been completed 'as far as or near to the townhead of the city of Glas- " gow,' being the very words employed in the former statute of the " 11 Geo. 3. In these circumstances, and considering the nature of the " point in dispute, the Lord Ordinary cannot listen to the averment now " made, at the distance of half a century, that this was all a misrepresen- " tation by the canal proprietors, and that the townhead of Glasgow then " denoted a particular point, totally different from that to which the canal " had, at the passing those statutes, been extended.

" Next comes the statute of 30 Geo. 3., by which the canal company " were empowered, in the first place, to deepen the whole canal and the " collateral cut connecting it with Glasgow to the depth of eight feet; to " prolong the collateral cut from Hamilton Hill, its original termination, " to Hundred-acre Hill, now Port Dundas, and from that point to con- " nect the navigation with the Monkland Canal. The latter operation " had been the subject of an agreement between the proprietors of the

pronounced the following judgment:—"The Lords "having heard counsel for the parties in their own

"two canals, by which the proprietors of the Forth and Clyde Canal "bound themselves to join the two 'by a canal of the same size and depth "'as the Monkland Canal.' Accordingly, nothing can be clearer than "the distinction made in the statute 30 Geo. 3., passed, in part at least, "for carrying this agreement into effect between the depth of the canal "and collateral cut as far as Hundred-acre Hill or Port Dundas, the "new point of connexion with Glasgow, and the depth of the line "between Hundred-acre Hill and the Monkland Canal. It authorizes "the first to be made 'of such depth of water as shall be equal to eight "'feet at least,' and the latter to be by a 'canal not exceeding the above "'dimensions.' Accordingly, as far as Hundred-acre Hill, now Port "Dundas, the canal was made eight feet deep, being the depth of the "general line of communication, and the latter four feet and a half, "being the depth at that time of the Monkland Canal, and the depth "stated in the estimate lodged in the Parliament Office previous *to* the "passing of the statute.

"Considering all these circumstances—the terms of the statute, and "the practical construction put upon them by all parties concerned—the "proposition of the pursuers, that the collateral cut of the general statu-"tory depth must be extended from Hundred-acre Hill, or Port Dun-"das, to the Monkland Canal, or at least to St. Rollox Works, appears "to the Lord Ordinary to be unwarranted and absolutely untenable.

"The other part regards the depth of the main line of the canal and "collateral cut connecting it with Glasgow, forming the subject of the "first conclusion of the summons. The canal is confessedly eight feet "deep at least. But it is maintained by the pursuers that the depth "ought to be ten feet, and that while it is not completed to that depth, "they are not bound to pay the statutory dues. From the nature of the "statutes referred to, it is unnecessary to inquire into the question, how "far terms, in expression merely permissive, are to be construed as im-"perative or binding against the proprietors of an undertaking like that "in question, when they are combined in the same statute, with the "power to levy dues to a certain amount. It so happens here, that, by "the statute of 27 Geo. 3., authorizing the deepening of the canal, no "additional canal dues were allowed to be levied; while, on the other "hand, the statute 46 Geo. 3., which did raise the dues, and under which "the dues at present exigible are levied, contains neither an obligation, "nor even a permission, to deepen the canal beyond eight feet, the depth "at which it then stood. So that there are no grounds for construing "the levying of the dues now exigible as conditional on the deepening of "the canal beyond eight feet.

"The first statute authorizing the depth of ten feet, is that of "54 Geo. 3. c. 195., which authorizes and empowers the Forth and "Clyde Navigation, 1st, to enlarge and extend the basin at Port Dun-

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" presence, and having resumed consideration of this " reclaiming note, recal the interlocutor in so far as it

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" das, and to make various other improvements; 2d, to alter, widen, " and enlarge the said canal, &c., 'in such way or manner as the said " 'company of proprietors, or their governor or council, shall think fit, " 'for making the same ten feet depth of water in every part thereof, " 'navigable and passable for boats, barges, and other vessels.' The sta- " tute also empowered the borrowing of a sum of 40,000*l.* sterling, for " the purpose of enlarging and extending the basin at Port Dundas, and " for altering, widening, and enlarging the canal, 'for making the same " 'ten feet depth of water in every part thereof, or for any or either of " 'such purposes.' There appears no ground for construing this statute " as imperative on the matter of deepening the canal. It contains no " counterpart which can be considered as a consideration for such an " obligation. For even as to the borrowing of money, the sums so raised " might be lawfully expended, and, as it is averred by the defenders, were " expended, on the other operations referred to.

" The only other statement founded on by the pursuers is the 1 Geo. 4, " c. 48., which neither authorizes an increased levy of dues, nor contains " any enactments, either permissive or imperative, in regard to deepening " the canal. It enables the proprietors, indeed, to borrow a sum of " 80,000*l.*, upon the preamble that 'it would be highly beneficial to the " 'public if the company of proprietors were empowered to borrow a " 'farther sum of money to enable them to carry into effect' the powers " of the preceding statute of the 54 Geo. 3. 'for deepening the said " 'canal, collateral cut, and cut of junction, to the full depth of ten feet;' " and it also contains a removal of a limitation within which the profits of " the company were, by former enactments, confined to ten per cent. at " most.

" In regard to this latter provision, it may be observed, that it proceeds " on a preamble totally unconnected with the deepening of the canal, and " which therefore cannot affect the present question. As to the power " of borrowing money, the parties are at issue on the fact. The pursuers " aver, and the defenders deny, that any money was borrowed under the " authority of that statute. The point certainly admitted of being very " easily ascertained, if the pursuers had been disposed to press it, which, " from some passages in their revised case, it rather appeared to the Lord " Ordinary that they are not. But, at any rate, it appears to him that " the averment is irrelevant to the conclusions of the present action. For " even if the money had been borrowed, and assuming, which he thinks " doubtful, the right of the public to found on the terms in which the " power to borrow is expressed, the utmost extent of the obligation im- " posed by the enactment would be that of expending the sum so bor- " rowed 'in deepening the canal to the full depth of ten feet.' It never " could support the conclusion of the present action that the defenders " were bound to make the whole canal of that depth, unless it was coupled

" finds the defenders and respondents entitled to ex-
" penses: Quoad ultra, adhere to the interlocutor
" reclaimed against, and refuse the desire of the re-
" claiming note: Find no expenses due to either party,
" and decern."

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The suspenders and pursuers appealed, and the judgment of the Court was affirmed on the grounds stated in the following judgment.

LORD CHANCELLOR.—My Lords, in this case Messrs. Tennant and Company, the proprietors of a manufactory situated on the banks of what is called the Junction Cut of the Forth and Clyde Canal, have instituted proceedings against the company of proprietors of the canal; the object of the suit being to compel the company to make that part of their canal called the collateral cut ten feet deep; it also had for its object to compel the company to make that part which is called the cut of junction ten feet deep. The summons further concluded, that the appellants might be repaid the sums of money they had paid for tolls, on the ground that those tolls were exacted as the consideration of the canal company making the canal in all its parts ten feet deep.

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Various acts of parliament were referred to in the argument, and I apprehend your Lordships will be of

" with another averment, which is nowhere made in the record, that the " sum so borrowed was sufficient to carry that operation into effect.

" Upon the whole, then, the Lord Ordinary considers the demands of " the pursuers to be entirely unfounded, and to have been made under " circumstances which fully warrant him in finding them liable in " expenses."

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opinion, that considering the provisions of those acts they conclude the whole question with one exception; that one exception being, whether the act of 1 Geo. 4. imposes an obligation upon the canal company which has not been complied with.

The proposition of the appellants, who failed below, and who have come to your Lordships bar to obtain a reversal of that decision, and to get the relief they prayed against the canal company, assumes, that by the act of parliament the company of the Forth and Clyde Navigation were bound to make what is called the collateral cut ten feet deep. It also assumes, that what the respondents call the junction cut is part of the collateral cut referred to in the earlier acts of parliament; and as a part of their proposition they contend that, by one of the acts of parliament which relates to the junction cut, the company were bound to make that portion of the cut ten feet deep. The questions with respect to the remedies which the appellants pray, namely, how far they are in a situation as against the canal company to compel them to make these portions of the canal ten feet, and how far they are entitled to a repetition of the tolls, can only arise in the event of your Lordships being of opinion that they have made out a right as founded upon the several acts of parliament.

Now, on a careful examination of the acts of parliament, it appears to me that several propositions are very clearly established; and if your Lordships should be of that opinion, it will be unnecessary to consider what remedies the pursuers might have had if they had made out their case. I believe your Lordships will find that by act of parliament it is clearly established,

that the collateral cut is a totally different work from what is called the junction cut, which was a continuation of the collateral cut, although the terms may be sometimes used indiscriminately, without distinguishing between the one and the other. Whether the collateral cut properly so called terminated at Hamilton Hill, and whether that is properly denominated the townhead of Glasgow, is in any view of the case mere speculation, inasmuch as I think it is quite clear that the subsequent acts of parliament treated the termination at Hamilton Hill as the termination of the duty which that act imposed upon the company, of making what is called the collateral cut.

I think it is perfectly clear also, that the junction cut being provided for and to be carried into operation under the authority of a distinct act of parliament, that act did not contain any obligation upon the company to make that portion of the canal ten feet deep. It appears that the collateral cut was completed in its present dimensions many years ago, and it appears likewise that the junction cut was also completed many years ago, as its present dimensions and the subsequent acts recognize the works effected in making the junction cut, without any objection being made to the mode in which those works had been completed. There is therefore a parliamentary recognition of the company having fulfilled the obligation which the prior act imposed upon them.

If this appear to be so on a review of the previous acts of parliament, your Lordships will have to consider how far the 54 Geo. 3., which authorized the company to extend the works so far as to deepen the canal as it respected both the collateral cut and the junction cut,

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imposed upon them the obligation, they having raised the sum of 40,000*l.* authorized by that act to be raised, and whether the provisions of the 1 Geo. 4. imposed a similar duty.

Now, my Lords, the acts of parliament commenced so early as the 8 Geo. 3.; that act clearly authorizes and enables the company to make a collateral cut, and the terminus there is described as the city of Glasgow, It is quite indifferent at what particular point that termination was to take place. The 11 Geo. 3. c. 62. authorizes the company to alter the course of their collateral cut. The second section authorizes the company to make a collateral cut "from the said "main canal, passing by Stockingfield, to or near a "place called Thimblefield, to or near Cow-caddens, "and to or near the townhead of the city of Glas-"gow." Now all the expressions to be found in that act of parliament are general and vague; they are "to "or near," which is exemplified by the map produced, in which Cow-caddens is to be found; Cow-caddens not being by any means near to the place where the canal passed. It is, however, a general description of a particular locality; and the place pointed out does not appear to me to be material, because I find a subsequent act of parliament, the 27 Geo. 3., taking up the same description and using the same words, clearly recognizes the completion of the works according to the description to be found in the act 11 Geo. 3.

If, in the state of the cause in which the Court of Session came to the decision appealed from, there was any fact necessary for the decision of the right between the parties, which either party might consider it essential to prove, and as to which proof

was denied them, no doubt that would be a just cause of complaint; but if there were facts decisive of the course found and recognized and established by acts of parliament, against which neither party could be permitted to aver and go into evidence in support thereof, it is obvious that the whole case was before the Court of Session, and they were entitled to take the first opportunity of deciding the case between the parties.

A great deal of argument has been employed upon the term, "the townhead of Glasgow." It is supposed to be some particular point going by that name, but there is no evidence, and I have no information upon that subject beyond what is contained in the act of parliament. Looking to the act of parliament, one would suppose that the townhead of Glasgow was rather a district than a point, and that it extended very considerably from east to west, for we find the Monkland Canal described in some acts of parliament as being in the townhead of Glasgow. We certainly find Hamilton Hill described in some acts as in the townhead of Glasgow. They are places not at a very great but at some considerable distance one from the other. All that, however, appears to me to be beside the question, because the acts of parliament have so recognized the transactions of the company as to make it perfectly immaterial whether the townhead of Glasgow be placed in one situation or another.

The act 27 Geo. 3. c. 55. recites the above clauses of the 11 Geo. 3., and states that since the passing of that act "the said main cut or canal had been carried on to "Stockingfield, and the collateral cut had been finished "as far as or near to the townhead of the city of "Glasgow;" the very expression used in the preceding

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act; that which was to be the terminus of the canal under the powers of the preceding act. It is very true that is stated to be finished "as far as or near to," which, it was argued, necessarily implied that it had not reached its terminus; but it had been completed quoad its terminus, otherwise it would not have been correct to say it had been finished "as far as or near to the "townhead of the city of Glasgow." The act of parliament had for its object to enable the company to proceed further, not in point of extent, but of depth, because the former act having provided that it should be seven feet deep, the object of that act was to provide that it should be eight feet.

The 30 Geo. 3. c. 73. is the first act which has reference to the junction cut; but I will call your Lordships attention to the 27 Geo. 3. c. 55., which I have just referred to, as affording an answer to the argument, that the collateral cut had not been finished. The 27 Geo. 3. recites, that it had been finished up to the particular place described by the preceding act as the proper terminus. As to the construction of these two acts, the 30 Geo. 3. c. 73. removes all doubt. It recites that the collateral cut had been made from the main canal "to a place called Hamilton Hill, within "the distance of a mile or thereabout from the city of "Glasgow." It recites the act under which the Monkland Canal Company had made their canal, which last, it is to be recollected, was to be of the depth of three and a half feet. It then recites, "that it would be "highly beneficial to the public at large if the Forth "and Clyde Company were empowered to carry on "their collateral cut from Hamilton Hill to the end of "the Monkland Canal, at or near the townhead of the

"city of Glasgow, and were enabled to purchase lands "for the purpose of making a harbour or basin at or "near a place called Hundred-acre Hill." It then enacts, "that the company of proprietors shall be autho- "rized and empowered to complete and finish the said "collateral cut or canal, of such depth of water as shall "be equal to eight feet at least in every part thereof, "from Hamilton Hill to or near a certain place called "Hundred-acre Hill, and from thence by a canal, not "exceeding the above dimensions, to the west end of "the Monkland Canal, at or near the townhead of "the city of Glasgow." Then the third section gives anew all the powers of the former acts, and directs that those powers shall be extended to the said collateral cut.

It is very true that that act speaks of continuing the collateral cut, but it is quite clear that the collateral cut intended to be made by the former act had been completed; and it is clear that the same course of navigation was to be continued, but by a work quite distinct from the collateral cut referred to in the preceding act, and to be made under the authority of this act only; for if not, how are the expressions to be accounted for, that the canal company were to be authorized and empowered? According to the argument of the appellants they were bound to do so; and it was a part of the provisions of the earlier acts that the collateral cut, meaning by that expression that referred to in the preceding acts, should be continued to the townhead, which townhead of Glasgow they say was in the neighbourhood of the Monkland Canal.

Now the recitals in and enactments of the 30 Geo. 3. appear to me, first of all, to establish that the work called

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in the former acts the collateral cut had been completed, and that the junction cut was an entirely new cut to be carried into effect under the authority of this act and this act only; and the provision as to that was, that a certain portion of it, namely, so far as the Hundred-acre Hill, was to be not less than eight feet in depth; but the other provision as to the other part, from the Hundred-acre Hill to the Monkland Canal, was that it should not exceed eight feet in depth. There is nothing imperative upon the company to make it eight feet deep, but there is an express provision that they are not to make it more than eight feet. Whether that was for the security of the neighbourhood, or whether it might be more convenient as connected with the navigation of the Monkland Canal, which was then only three and a half deep, which by the 17th section of the act it was provided should be deepened to four and a half feet, it is not necessary to inquire. The provisions of the act are very distinct as to that portion of it between Hamilton Hill and Hundred-acre Hill and the junction of the Monkland Canal.

The next act of parliament is the act of 1806, which recites the act of the 30 Geo. 3., and recites that the Forth and Clyde navigation had been completed at a large expense. Now, whether the expression, "the "Forth and Clyde navigation," could properly include the collateral cut and the junction cut between those two navigations, it is not very material to inquire; but this act authorized the company to raise their tonnage. And the argument of the appellants is, that they had not performed the duties imposed upon them by the preceding acts, and that they were bound, out of the tonnage they were entitled to receive under the former

acts, to deepen their canal to a certain depth throughout the whole extent of the navigation. But this act recognizes that they have duly performed the duties imposed upon them by the former acts, and have incurred a great expense in carrying on those works, and therefore it authorizes them to receive this increased tonnage; and that tonnage imposed or rather authorized to be taken by that act of 1806 is the tonnage, and the whole tonnage, which the company have since taken, or which they are authorized to take.

Then comes the act of 1814, which establishes the same proposition by its recitals and enactments. It recites that it would be beneficial to encourage manufactories on the said canal, collateral cut, and cut of junction with the Monkland canal, speaking of them as totally distinct works. The second section authorizes and empowers the company to alter, widen, and enlarge the said canal, collateral cut, and cut of junction, and the works thereto belonging, and to raise the bank or to sink the bed thereof in such way and manner as they shall think fit for making the same ten feet deep; and then the 17th section authorizes them to borrow 40,000*l.*

It is not necessary to go over the same observations as to the recitals and enactments. With regard to the words it is quite distinct, but upon this act a different argument has been raised from that on the last, namely, that as the canal company were authorized to borrow 40,000*l.*, and as the object of borrowing that 40,000*l.* was to deepen and widen the collateral cut and the cut of junction, that, having exercised the powers given to them by that act, they were bound to perform all those works. Certainly this is a very large and startling proposition for all companies who undertake great works,

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under the numerous acts of parliament now passed for that purpose. The argument at the bar was, that whenever any company obtain a parliamentary power to expend a large sum of money, and to reimburse themselves for the money so expended by tolls, they are bound to complete the works they have undertaken; that is to say, that every railway company which obtains an act of parliament, having authority to raise a certain sum of money, which is scarcely ever found adequate to the work, is bound to complete the works which they contemplated. That they are bound to apply the money which they are authorized to raise is true, but it is quite a new proposition that they come under an undertaking to complete the works. If that were so, it would be a very useless law to the community, because, as they are a corporation, you have no remedy against them beyond their corporate property. The existence of the right is a new proposition, and it is one the enforcement of which would produce very serious hardships upon those who undertook these works, on calculations which are found to be inadequate for the purposes intended.

Now it is clear, on consulting the act of parliament, that that 40,000*l.* was employed upon those works, which, however, were not all carried into effect, and for this simple reason, that the funds were not adequate to the purposes intended; but that the sum was raised and employed is clearly established by the recitals of the next act of parliament, the 1 Geo. 4. c. 48. But, independently of this, it is quite obvious that that act did not impose any obligation beyond that which might arise from having raised the 40,000*l.* There is no obligation upon the company to deepen the canal; it only authorizes them to do the same "in such manner

"as they shall think fit." Their duty, therefore, and the obligation they entered into with the public under that act of parliament, as I apprehend, was to employ the 40,000*l.*, which they were authorized to raise, in performing those works which were intended to be carried into effect by the provisions of that act.

The next and the last act I shall have occasion to refer to is the 1 Geo. 4. c. 48., and that recites that the whole of the 40,000*l.* had been expended; I am to assume properly expended; and that not only the 40,000*l.*, but a much larger sum had been expended by the company; and it also recites that the company had increased the canal and collateral cut to nine feet deep, making no mention of the cut of junction, for this obvious reason, that that had been deepened under the provisions of the former act. It then recites, "that it "would be highly beneficial to the public if the com- "pany were empowered to borrow money to enable "them to deepen the canal, collateral cut, and cut of "junction to the full depth of ten feet." They have then a power given them to raise 80,000*l.* upon the credit of the tolls, to be applied to the purposes of the act. That act again draws a distinction between the collateral cut and the junction cut; it recites that the collateral cut had been deepened, not to ten feet as intended by the act of 1814, but only to nine feet; it does not take any notice of the cut of junction, but recites that it would be for the benefit of the public, or might be for the benefit of the public, that all should be deepened to ten feet, and authorizes the company therefore to raise 80,000*l.* With regard to that 80,000*l.* there does not appear to be any doubt upon the fact, though there is no clear technical proof that the sum of 80,000*l.* has

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been raised; but it does not appear to me very important to inquire whether it has been raised or not. If it has not been raised, then it is clear that the argument of the appellants entirely fails, because the argument founded upon the decision in the Monkland Canal case[1] must be — inasmuch as you raised the money which you were authorized to raise, you shall not be permitted to receive tolls as a compensation for such expenditure, unless you have performed the works which that expenditure was intended to provide for. If the money was raised there was then the authority to which I have referred, and if it was not raised, they have still the power to raise it. The argument is supposed to apply in the event of the money being raised, but in the event of the money not being raised, the obligation clearly does not exist under the act.

Now I will suppose that the money has been raised; there is no allegation on the part of the appellants that the money raised has been improperly applied. If the money raised has been improperly applied, no doubt there would be a remedy for the public who may be called upon to pay tolls, in order to secure to the company the benefit which the expenditure of that money was intended to meet; but there is no such allegation. The provision of the act of parliament as affecting the application of the tolls (the tolls being raised under the provisions of the act of 1814) was, that the dividends should not exceed ten per cent., and that when they had reached ten per cent. the surplus arising from the tolls should be applied in reducing the tonnage; and the argument on the part of the appellants was this, that

[1] Dixon v. Monkland Canal Company, 1 W. & S. 636.

this 80,000*l.*, being an additional burden thrown upon the tolls, and the interest on the 80,000*l.* so raised being one of the objects to which the tolls have been applied,—the period has been protracted at which the public would have a right to have the tonnage reduced. Whether such a case, if made and proved, would give a party a title to any relief or not, is quite unnecessary to consider, for there is no such case made; the allegation is quite immaterial to the present purpose; although material in the view the appellants took of the case, it is quite immaterial in the view which the Court of Session took of this case, and which your Lordships are likely to take. The view taken by the appellants is, that the money has been expended, and the allegation in the summons is, that the company ought to have divided among themselves the ten per cent., not upon the capital as provided for by the various acts of parliament, but upon the original capital, that is upon the limited sum which, in the first instance, was taken as the sum sufficient to carry the works into effect; all the subsequent acts having had the effect to increase the capital, and to extend of course the amount of the sum on which dividends were to be paid, and therefore, of course, requiring a much larger annual sum to meet the dividends, whether the dividends were five or six or ten per cent.; but there is no allegation that the money received for tonnage has been sufficient to pay even ten per cent. on the capital, as now existing under the various acts of parliament. The case, therefore, for reducing the duty on the tonnage is not stated upon the pleadings to have arisen; and there can be no doubt, from what appears on both sides, that that case has not at present arisen.

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The result therefore is, in the view I have taken of the acts of parliament, that the company have been under no default; that they have done that which under the acts of parliament they were authorized and compelled to do; that they have completed the collateral cut; that their having done so has been recognized by subsequent acts; that they have completed the cut of junction, and that has been recognized by the subsequent acts; that the 40,000*l.* raised under the 54 Geo. 3. is by the subsequent act recognized as having been properly applied; and that there is no case stated, as to any right arising to the appellants from the last act of parliament, authorizing the company to raise the 80,000*l.*, either that it has not been raised, which there is every probability that it has, from what is stated on the one side and the other, nor is there any case stated of its having been misapplied, or of the appellants having sustained any loss from the mode in which it has been applied.

Under these circumstances, I should advise your Lordships to affirm the interlocutor of the Court of Session. With regard to the costs, I think it is a very wholesome rule in cases in general, and one which I am desirous of following, that those who come to your Lordships bar with a case which they cannot support should pay the costs. Undoubtedly the cases from Scotland very often create a great difficulty in carrying that rule into execution. I am sorry to say, we find more difficulty in that respect in the appeals from that part of the kingdom than from any other; for it does more frequently happen in cases from Scotland, that the judges below are found to have differed in their opinion; and it may be very hard to apply that rule when

that is the case. The suitor finding that the judges were divided in opinion on what he conceived to be his right, some being in favour of that right and some against it, he may very well be supposed to be entitled to come to the place of the last resort to have his rights finally decided; and when that is the case one can hardly say that he ought to be visited with costs, for doing that which the judgment from which he has appealed would rather seem to authorize him to do. Under these circumstances, I am afraid it would be hard upon the appellants in the present case to make them pay the costs of the respondents; therefore I should advise your Lordships to affirm the interlocutor without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

Appellant's Authorities. — Blakemore v. Glamorganshire Canal Company, 1 My. & K. 154; Rex v. Inhabitants of Cummerworth, 3 B. & Ald. 108; Scales v. Vickery, 4 Bing. 448; Stourbridge Canal Company, 2 B. & Ad. 792; Dwarris on Statutes, 712.

Note. — See also Lee v. Milner in Exchequer, referred to by Lord Denman, C. J., in Regina v. Eastern Counties Railway, Trinity Term, 2 Vict.

RICHARDSON and CONNELL, — D. CALDWELL and SON, Solicitors.

[19*th March* 1840.]

(No. 4.) JOHN REID, Appellant.[1]

[*Lord Advocate (Rutherfurd) — Sir W. Follett.*]

ISAAC BAXTER and others (Reid's Trustees), Respondents.

[*Pemberton — James Anderson.*]

Writ — Stat. 1540, *c.* 117. — *Stat.* 1579, *c.* 80. — A party was able to write, and was in the practice of subscribing writings requiring his signature: his eyesight, however, was so defective, that he could not read any written document, nor decypher a signature attached to it, although at the time when he signed his own name he could infer, from general appearances, that he had adhibited his subscription, but not by his mere vision decypher the same afterwards. Under these circumstances he executed, by the intervention of notaries, a trust testamentary disposition and codicils: — Held (affirming the judgment of the Court of Session), that the deed was not liable to objection in respect of its execution; that the form of execution adopted was good; that the party might, if he pleased, execute the deed by his own signature, but that he was also at liberty to resort to the assistance of notaries.

Practice.—Parties by a joint minute agreed to take judgment upon a certain admitted state of facts: — Held, per Lord Chancellor, to be incompetent to refer to documentary evidence previously produced in process, in support of statements made at the hearing. (See p. 70.)

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[1] Rep. 16 D., B., & M., 273; Fac. Coll., 13th Dec. 1837.

IN 1833 the appellant, as the son and nearest lawful heir of John Reid his father, now deceased, brought a reduction of a testamentary trust disposition, and of two codicils thereto, executed respectively in the years 1822, 1825, and 1830, in favour of the respondents, as granted to the lesion of the appellant.

The ground of reduction libelled was, that the writings were executed by the interposition of notaries at periods when the granter was able to write, although labouring under defective vision. The Court (7th July 1835), upon report of the Lord Ordinary as to the mode of preparing the cause for judgment, remitted to the Lord Ordinary to direct the preparation of the draft of an issue or issues relative to the special facts in dispute betwixt the parties. But the following joint minute was in the mean time settled by both parties, as containing the facts upon which the judgment of the Court should proceed:—"1. That the late John Reid, at the "date of the deed and codicils in question, could sub- "scribe his name, and was in the practice of subscribing "it to writings requiring his signature: 2., that the said "John Reid was, at the dates aforesaid, not totally "blind, but that his sight was so defective, that he could "not read any written document, nor decypher the "signature attached to it, although able at the time of "his own subscription to infer from general appear- "ances that he had affixed it, but not by his mere "vision to decypher the same afterwards."

The Lord Ordinary Cockburn (24th December 1836) authenticated this joint minute as part of the record, and as sufficiently fixing the facts, and ordered cases, with which Lord Cuninghame (by whom his Lordship

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was succeeded as Ordinary) made avizandum to the Court.

The Lords of the Second Division, upon advising the cases, the counsel not desiring to be further heard, pronounced the following interlocutor:—13th December 1837. "The Lords, on the report of Lord Cuninghame, having advised this process with the cases for the parties, and heard counsel thereon, repel the reasons of reduction in so far as founded on the deeds in question having been executed by means of notaries and not by the subscription of John Reid the maker, and to the same extent sustain the defences and decern, and find the pursuer liable in expenses in so far as incurred in reference to this point," and, quoad ultra, remitted to the Lord Ordinary to dispose of matters in the cause not material to the present question.[1]

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[1] *Lord Glenlee.*—"I am so satisfied with the decisions formerly pronounced upon the point here involved, that I need not go into a discussion of the argument stated. There are certain decisions referred to by the defenders in the last page of their case. One of these is most important and decisive. But on the opposite page to that on which the case of Littlejohn stands, in Morrison's Dictionary, there is the case of Ogilvie, 14th March 1612 (M. 16829), where it was held, in regard to a man who could write, but chose to call in notaries, and where nullity was alleged, without the deed being impugned, that this was not sufficient to make the deed null.

"Then Veitch v. Horsburgh is decisive. It was objected that the granter could write. The Court repelled the plea, that the party had not signed with his own hand; and as there was no offer to impugn the deed as false, the action was dismissed; and the Court went so far as to hold it was incumbent on the party to show that the granter was 'letted,' as they call it, from writing at the time.

"It would be difficult after this, and there being no decision to the contrary, to hold the execution of this deed bad. These old decisions were pronounced by judges who lived nearer the period of the enactment, and must therefore be presumed to have known more about the matter. It seems to be taken for granted, in the pursuer's argument,

The pursuer appealed.

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Appellant's Argument.

Appellants.—1. The execution of deeds in Scotland is matter of statutory regulation.[1] The general rule sanctioned by statute is, that persons having the power of writing shall authenticate their deeds by attaching to them their own subscription. The only exception is that introduced by statute 1579, c. 80., which allows the aid of notaries to those who are absolutely incapable of writing. Mere want of sight, or incapacity to read writing, does not entitle parties to depart from the rule, which prefers even subscription by initial letters, where parties have been in use so to sign[2], to execution by notaries. The judgment of the House of Lords in the cause of Sir James Duff v. The Earl of Fife, 17th July 1823[3], in substance determined that a blind person who can write is, in regard to the execution of deeds, exactly in the situation of any other person who can write, and that subscription by the party is "the proper mode" of subscription. There, Lord Fife the maker of the deeds, was so blind as to be unable to read any writing or print, or to know whether paper was written on or not, and so in the same situation as Reid in this case. [LORD CHANCELLOR.—What is meant by the words in the minute "able to infer from general appearances," &c.?] Although the party had not clearness of vision sufficient to decypher, yet that he had sufficient vision to see

"that signing by notaries was unknown 200 years ago; but that is not "the fact. I am for sustaining the defences. The other Judges con-"curred."—Rep. in Fac. Coll.

[1] Statutes: 1540, c. 117; 1579, c. 80; 1681, c. 5.

[2] Piery v. Ramsey, 9th Jan. 1628, Mor. 16801, and other cases in Mor., voce "Writ;" and Weirs v. Ralstons, 22d June 1813, Fac. Coll.

[3] 1 Sh. App. 498.

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that he was tracing on the paper, what, if the ink failed not, would be the letters of his name; and though at the time he might know there was something he had been writing, he would not, at a short interval, be able to recognize it. [LORD CHANCELLOR.—To see that something was written, but not be able to distinguish what?]

Besides, he actually could write well, as appeared from the productions in his handwriting in process. [Mr. *Pemberton*, for the respondents, objected that the facts as admitted in the joint minute, precluded any reference to other documents or evidence in the cause. The LORD CHANCELLOR held that these documents could not be referred to.]

The opinions of Lords Eldon and Redesdale[1], in Lord Fife's case, must now be held in practice as having settled the law, that a party similarly situated ought properly to execute his deeds by his own subscription, and not by notaries.[2] [LORD CHANCELLOR.—Is it any part of the appellant's case, that a blind man who can write must sign with his own hand, and is not entitled to call in notaries. Lord Fife's case is different, for there it seems only to have been held, that a blind man may sign with his own hand.] To hold that a man who can write may call in notaries, would be to act contrary to statute, which directs that if he can write, he shall do so with his own hand.

Farther, it is material that the present challenge is at the instance of a third party, namely, the heir to whose prejudice these unilateral deeds were granted. It is not

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1 Sh. App. 498, passim, to *565*; Bell on Testing of Deeds, sect. *5*, p. 149.

2 Tait on Evidence, 3d edit. p. 58—61.

like a party to a contract quarrelling his own act; and hence the cases of Veitch, of Littlejohn, Ogilvie, and others[1] relied on by the respondents, which were cases of parties, in fraudem of their own act, seeking to set aside deeds granted by them, do not apply.

Appellant's Argument.

2. Even if notarial subscription was in the circumstances competent, the deeds are not duly executed, in respect that the notarial docquets do not set forth a reason for the execution by notaries sufficient to warrant such execution.[2] Every notarial attestation ought to set forth that the party was unable to write; that being the only case in which notarial execution is sanctioned by statute, and it having been held indispensable in practice, that the fact of inability to subscribe should appear on the notary's docquet.[3]

Respondents Argument.

Respondents.—1. It is not necessary to carry the argument so far as to contend, that a party who is under no disability may execute his deeds by the aid of notaries; but certainly there will be no inconvenience from leaving it to the option of the party. The terms of the statute are not imperative, but merely directory; and when the mode pointed at is not made imperative, to be done under the sanction of nullity, the objection

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[1] See post, p. 73.

[2] Tait on Evid., p. 16, et seq.; ibid. p. 131; Moncrieff v. Monypenny, 15th July 1710, Mor. 15936; Robertson v. Young, 22d Dec. 1744; Elchies' Dic., v. "Writ," No. 18.; Falconer v. Arbuthnot, 9th Jan. 1751, Mor. 16517; Buchan v. Gouk, 1762, 5 Bro. Supp. 640.

[3] Primrose v. Dury, Mor. 14326; Mackintosh v. Inglis and Weir, 17th Nov. 1825, 4 S. & D. 190; Williamson v. Urquhart, 23d July 1688, Mor. 16838; Philip v. Cheape, 26th July 1667, Mor. 16835; Bell's Lect., p. 170; M'Kenzie v. Burnett, Feb. 1688, Mor. 16838; Burell v. Moffat, 18th June 1745, Mor. 16846. See Kilk. Observations, and also Elchies' and Falconer's reports of the case.

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ought to be overruled. So it was held in England, in a case under a commission of enclosures, Casamaijor v. Strode[1]; and so in regard to neglect of statutory solemnities in the Reform Act by the revising barristers. It may be assumed, that the law was clear up to Lord Fife's case.[2] Now the question there was, whether a deed actually subscribed by a party although blind, and being ex facie a probative deed, was necessarily not the deed of the party, simply because he had executed the same by his own subscription, and without the aid of notaries. Although it was held by the House of Lords, that the subscription of a party who can write and who actually did write was a good subscription, it by no means follows that a subscription by notaries under such circumstances is not a good subscription, or that a party who can go through the mechanical operation of signing his name, but without being able to see what he is signing, must subscribe his deeds with his own hand, and is not entitled to the protection of notarial subscription. The opinions of Lords Eldon and Redesdale do not sanction any such doctrine; and indeed it would be strange if they did, for the effect of it would be plainly to make the statute provide for something which would directly defeat its object. The authorities generally are conclusive against the proposition maintained by the other side.[3]

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[1] 2 My. & K. p. 706; 5 Sim. 87. [2] 1 Sh. App. 498.

[3] Merry v. Dunn, 21st Nov. 1835, Fac. Coll.; 10 S., D., & B., *555*; Cod. lex 8, Qui test. facere possunt, 1 Ross' Lect. 158; Craig v. Collison, 19th Jan. 1610, Mor. 16828; Picken v. Crosby, 22d July 1749, Mor. 16814; Elchies' Dict., v. "Writ," No. 25; Falconer v. Arbuthnot, 9th Jan. 1751, Kilk. See MS. Notes of Lord Drummore in respondent's appeal case in Fife cause; Ross v. Aglionby, 11th June 1794, Fac. Coll. App.; Yorkston v. Greene, 2d Dec. 1794, Fac. Coll.; Mor. 16856; Coutts v. Straiton, 21st June 1681, Mor. 6842; Grant v. M'Pherson,

2. The objection to the form of the docquet is not made part of the record, and is immaterial, no particular style being requisite in the docquet, and it being sufficient that it appear that the notary authenticated the deed at the desire of the party.[1]

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Respondents Argument.

Judgment deferred.

LORD CHANCELLOR.—My Lords, this is a question which is reduced to a very short point, depending upon a state of facts agreed to between the parties, and which formed the ground for the judgment in the Court below. The case is stated very fully in the printed papers.

Ld. Chancellor's Speech.

The object of the suit is to raise the question as to the validity of an instrument executed by John Reid; and the circumstances under which the deed was executed, and the state of John Reid at the time of executing the same, are to be found in the admissions to which I have alluded, and which I will now read to your Lordships. (His Lordship read the minute set forth in the preceding statement.)

These facts are important, from the provisions of two Scotch acts of 1540 and 1579. The first (1540, c. 117.) provides, "That na faith be given in time cumming to "ony obligation, band, or uther writing under ane

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23d June 1812: Littlejohn v. Hepburn, 8th Dec. 1608, Mor. 16826; Ogilvie v. Din's Heirs, 14th March 1812, Mor. 16829; Veitch v. Horsburgh, 23d January 1637, M'Dougall, eo die, Mor. 16834; Sheil, 4th July 1739, Mor. 17033.

[1] Dallas v. Paul 13th Jan. 1704, Mor. 5677, 5679, and 16839; Maver v. Russell, 10th July 1710, Mor. 16841; Gordon v. Murray, 21st June 1765, Mor. 16818; Ersk. 3. 9. 8.

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" seale, without the subscription of him that awe the " samin and witnesse, or else, gif the partie cannot " write, with the subscription of ane notar thereto." The second act (1579, c. 80.) is nearly similar in terms, with, however, one difference; it enacts, " That all con- " tractes, obligationes, reversiones, assignationes, and " discharges of reversiones, or eikes theirto, and gene- " rallie all writtes importing heritabil titil or utheris " bandes, and obligationes of great importance, to be " maid in time cumming, sall be subscrived and seilled " be the principal parties, gif they can subscrive." In the second act the words, " cannot write," which are to be found in the first, are changed for " gif they can " subscrive." And the provision in the second act is, " Utherwise be twa famous notars, befoir four famous " witnesses, denominate be their special dwelling places, " or sum uther evident takens that the witnesses may " be knawen, being present at that time, utherwise the " saidis writs to mak na faith."

The question is, whether, under these acts, the instrument in question, which was subscribed, not by the party himself, but by notaries, as provided for by the act of parliament, is to be invalid, in consequence of its not having been subscribed by the party himself. The proposition on the one side was that it was valid, and on the other it was said that that proposition was capable of being urged to consequences which were not a little startling. It was said that if that mode of subscribing be permitted, it would be impossible, at almost any time, or under any circumstances, to object to an instrument because it was executed before notaries. But, on the other hand, your Lordships will observe what argument may be

raised. The proposition contended for on the other side would lead to this conclusion, that a party absolutely blind must still execute the document by himself, for although he was not capable of seeing, if he was capable of writing, (as all persons who have ever been capable of writing before they are blind must be capable of doing to a certain extent after they become blind,) he would still be bound to execute the instrument by himself. It is quite obvious that this would open a door to great fraud, for if he was obliged to execute an instrument by himself under such circumstances, it would by no means follow that he was subscribing the document which he intended to subscribe; another might be put before him, and he would be quite incapable of knowing whether the document to which he did subscribe his name was the document he intended, or was another fraudulently imposed upon him.

In the short view I propose to take of the authorities it will not be necessary to consider what may be the rule in cases other than that which is now before your Lordships; and I shall therefore avoid doing so, the more especially as I believe it is a dangerous practice at all times to go into the consideration of what would be the rule in other cases unless you are compelled to do so. We have here the fact admitted, that the party, although able to write and subscribe his name, was not able to read writing afterwards,—that his sight was so defective that he could only know from the general appearance of the paper that he had subscribed a document.

Now there are statutes of ancient date regulating this matter, and if any real doubt exists as to the construction of them, it would be well that we should look to the

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construction which has been put upon them from the time when they were passed, and to the practice which has grown up as the consequence of such construction. It will be desirable to consider these circumstances before your Lordships decide upon the case; for if you should lay down a rule of law different from that which has been in ordinary operation for a long period, you might by such a judgment invalidate the titles of property, and interfere materially with the interests of those who are concerned with property in Scotland.

I should have thought that there was no great difficulty in the case, if this question had arisen for the first time,—if we had had to put a reasonable construction for the first time upon those statutes, without any previous decisions having existed. It appears to me to be a strong proposition to say, that, according to the meaning of the statutes, a party may be said to be capable of subscribing his name when he is not capable of reading the document which he has to subscribe, or the name when he has subscribed it. But we need not necessarily discuss what might be the construction if the question were entirely new; for from the earliest period after the passing of the acts, your Lordships will find that the construction put by the Courts of Scotland has been, that a party under circumstances similar to those which now exist was at liberty to use the interposition of notaries.

Before adverting to those authorities, the question may be naturally asked, what authorities there are to be found in support of the proposition of the appellant? What decisions are there in the Scotch law to show that a person not capable, from want of sight, to read a

document, is yet to be the person who must subscribe it, and is not to be at liberty to avail himself of the assistance of notaries? There is not one case in favour of such a proposition. On the other hand, there is a variety of cases, in some of which it has been decided, and in others it has been assumed, that where a party could not read, he was at liberty to avail himself of the interposition of notaries. Picken v. Crosby in 1749; Falconer v. Arbuthnot, in 1751; and Ross v. Aglionby, in 1794, (ante p. 72.) all decided directly, or they all indirectly assumed, such to be the rule of law. The older cases of Craig in 1610, of Ogilvy in 1612, of Veitch in 1637, and Sheil in 1739 (antea, pp. 72 and 73), seem to me also to support the proposition.

But then it is said that those last-mentioned older cases do not apply, inasmuch as the question in all of them was raised with the party himself, who had executed the document, and who, to avoid the consequences of his own instrument, had set up the defective execution in answer. It is true that the party in all those older cases had executed the document by the intervention of notaries; and on being called upon to perform his own agreement he had resisted doing so, on the ground that the deed he had executed was not executed according to the provisions of the statutes, and that it was consequently void. In all those cases the defence was overruled. An attempt was therefore made to exclude those cases from your Lordships consideration, on the ground that in all of them it was the personal objection of the party himself to his own deed being enforced against him, and that he must be looked upon as an individual endeavouring to defeat the consequences of his own act

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by a technical objection. But how was the Court competent to know what was the conduct of the party without in the first place receiving the document in evidence? If the right to be enforced depended upon a written document which the law required to be duly executed, the Court was obliged to receive the document in evidence, in order to know whether it was or not a valid deed, and thus the validity of the execution was under the consideration of the Court.

The case of Coutts v. Straiton, in 1681, (antea, p. 72.) seems to me to be of more weight than any of those relied on by the appellant. That was a case in which the question before the Court was, whether a party was at liberty to sign a document with initials, (one question being, whether initials could constitute a sufficient signature,) and it was stated that the party was so far blind as not to be capable of reading the writing. The Court held, that it was a good instrument. There are thus concurrent decisions, showing that a party although blind might properly subscribe an instrument, (even if that signature was in initials,) either by his own signature or by the intervention of notaries.

Some of those cases do not appear to have been sufficiently brought under the consideration of the Court, or attended to by the Judges, when the case of Lord Fife (antea, p. 69) arose. That case came before the Court of Session for judgment upon proof, by the verdict of a jury, that the late Lord Fife, the party executing the deeds sought to be reduced, was nearly in a state of total blindness; and the Court held, that the deeds executed were not well executed, in respect that the party had subscribed his name thereto, whereas he

ought to have required the intervention of notaries. But this House reversed the judgment of the Court of Session, in so far as it proceeded on that ground, and held, that if the party could so sign the instruments, the execution of these might be valid, notwithstanding his state of blindness.

The only ground by which the appellant has attempted to support his case is, the judgment of this House in the case of Lord Fife. It was with a view to consider whether that judgment was inconsistent with the others which had preceded it, and whether it necessarily rendered the subscription of the deeds in the present case bad, that I suggested to your Lordships the propriety of adjourning the consideration of the present case. I have since gone through all the cases. I have examined all that was said in the case of Lord Fife, both by Lord Eldon and by Lord Redesdale, and I do not think that there is any thing in that case which says, nor any opinion expressed laying down the law to be, that a person under the circumstances here admitted is not at liberty to resort to the mode of notarial execution. In coming to the conclusion that the party might himself subscribe, it was not necessary to decide that he was not entitled to resort to notaries.

It appears then that for two hundred years there is no direct authority for the proposition now contended for by the appellant; but on the contrary a series of decisions the other way. In Veitch v. Horsburgh, (antea, p. 73,) the construction put upon those statutes was, that a person with that degree of want of sight which exists here was at liberty at all events to execute by the intervention of notaries; and against that deci-

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sion nothing has been relied on, but the opinions supposed to have been expressed in this House in Lord Fife's case, which did not decide this point, but decided in a manner quite consistent with the allowance of this mode of execution.

A variety of evils might arise from your Lordships laying down a rule not consistent with the former decisions; and before doing so, there would be matter deserving of serious consideration, even if there was more in the case of the appellant than I think there is. On the other hand it does not seem to me that any difficulties will arise from the adoption of the course which I shall recommend to your Lordships. I have therefore come to the conclusion, which I shall now state to your Lordships, that the form of execution adopted under these circumstances is good; that the party may under these circumstances, if he pleases, execute the deed by his own signature; but that he is also at liberty to resort to the assistance of notaries. Under these circumstances, and as it was an unanimous judgment of the Court below, I shall move your Lordships that the judgment of the Court below be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted

back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

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RICHARDSON and CONNELL — ARCHIBALD GRAHAME, Solicitors.

[19*th March* 1840.]

(No. 5.) JAMES NEILSON, Appellant.[1]

[*Lord Advocate* (*Rutherfurd*) — *Donaldson.*]

Mrs. JEAN DONALD, or COCHRANE, Widow of JAMES COCHRANE, Farmer at Linwood, and others, Respondents.

[*James Anderson* — *S. S. Bell.*]

Vicennial Prescription — Service — Stat. 1494, *c.* 57.; *Stat.* 1617, *c.* 13. — In 1809 a party was served nearest and lawful heir to the grantor of a deed of settlement, and he thereupon executed a ratification of the said deed. A reduction of the deed, and of the service and ratification, was brought by another party in 1833, on the ground that he was a nearer heir of the grantor:—Held (affirming the judgment of the Court of Session), that the statute 1617, c. 13., was rightly pleaded in bar of the action.

2D DIVISION.

Lord Ordinary Cockburn.

Statement.

IN March 1802 John Neilson, at Linwood, now deceased, executed a disposition and settlement of his whole property, heritable and moveable, in favour of James Cochrane. This deed having been questioned by parties alleged to be the nearest relations of the deceased, Cochrane obtained a deed of ratification confirming the disposition and settlement from James Neilson at Newland Craigs, who in 1809 expede a general service, and was retoured nearest heir of the disponer John Neilson. This ratification was afterwards made the subject of

[1] Rep. 15 D., B., & M., 365; Fac. Coll. 17th Jan. 1837.

judicial proceedings by the appellant, who had taken out a brieve in 1811, but did not then expede a service as heir of John Neilson. No further step was taken till 1833, when the appellant having expede a general service as nearest heir of the deceased John Neilson brought a reduction, ex capite lecti, of the disposition and settlement, and also of the deed of ratification and of James Neilson's service.

Among other defences, the respondents pleaded in limine, that the action, in so far as it was brought for setting aside the retour and service of James Neilson, was excluded by the act 1617, c. 13.

A record having been made up on this preliminary defence, the Lord Ordinary reported the cause on cases to the Court.

The Lords of the Second Division (14th May 1835) allowed the parties to give in additional cases if they should think fit, and appointed the same, with the cases and the record, to be laid before the whole judges for opinion.

The consulted judges returned the opinions subjoined.[1]

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[1] Opinions by the Lord President (Hope), Balgray, Gillies, M'Kenzie, Corehouse, Fullerton, Jeffrey, and Cockburn:—

"We have considered the cases given in by the parties, and the interlocutor of the Second Division of the Court, of date 14th May 1835, and we consider that the conclusion in favour of the defenders is unavoidable.

"The act 1617, c. 13., 'statutes and ordains that the said act of parliament' (referring to the act 1494, c. 57.) 'shall noways hurt nor prejudge the nearest of kin to seek reduction of the saids retours and service to be past and expede in time coming, and that within the space of twenty years immediately following the date of the saids retours and services; and if the saids summons of reduction be not intented, executed, and pursued before the expiry of the said twenty years, that the said action of reduction of the said retour and service,

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On again advising the cause, the Lords of the Second Division (17th January 1837) pronounced the following judgment:—

" ' shall prescrive in the self, and no party to be heard thereafter to pursue " ' the same reduction.'

" The terms of the act appear to be clear and unambiguous, particularly when considered in reference to the act 1494, to which it " alludes.

" It is very difficult to conceive that the framers of the act 1617, c. 12., " intended by the act, c. 13., both passed, it may be said, on the same " day, to alter, vary, or to do any thing inconsistent with the object of the " other statute.

" The act, c. 12., declares, that where a title is produced, followed by " infeftment, and clad with possession for forty years, the same shall create " a good, valid, and sufficient right. The title referred to is either a " direct conveyance or a retour, or a precept of clare.

" The act, c. 13., relates solely to one of the titles referred to in the " act, c. 12., and there appears to be no inconsistency in declaring, that " a particular title shall be held, after a certain period of time, unobjectionable and unchallengeable. This forms but one element of the act, " c. 12.; and the other requisites must concur before the benefit of the " act can be obtained.

" When the difficulty of establishing propinquity is considered, which " in most cases depends upon human testimony, it does seem highly expedient and just to limit the period within which a service can be set " aside, and the party of new called upon to undertake a probation; and " we are persuaded that this was the view of the legislature.

" We are the more confirmed in this view of the statute from considering what is laid down by our institutional writers from an early " period, and uniformly adhered to. These are distinctly laid down in the " case for the defenders, from page 10 to page 16. These cannot be " disregarded.

" The unfrequency of discussion on this point, and the paucity of " decisions, seem to indicate an acquiescence of the profession and of the " public in the opinion given out by the professed authors on the law, " in so clear and in so decided a manner.

" The case referred to by M'Kenzie, 22d November 1665, Younger " v. Johnston, was not then decided, but it was finally determined " 28th November 1665, Stair's Decisions, vol. i. p. 315, and there the " Court were of opinion and found ' the reduction of retours to prescrive " ' sooner than other right.'

" We consider the case of Bargany to be in no ways applicable to the " present. It was a very peculiar and circumstantial case. The retour " in that case was of so singular a nature as to bear in gremio a complete " explanation.

" Upon the whole, therefore, we are of opinion, that in a question with

" The Lords having advised the cause, with the " opinions of the consulted Judges, and heard counsel " for the parties, sustain the third preliminary defence

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" heirs the act 1617, c. 13., applies, and that the defender is entitled to " plead the benefit thereof.

" We may add, in conclusion, that as to all the consequences that " may be deducible from this unavoidable interpretation of the law, " we cannot prejudicate; that must be left, if required, to legislative " interference."

The following opinion was returned by Lord Moncreiff:—

" Though it is not without considerable difficulty, I concur in the " result of the above-written opinion. But as I cannot concur in the " view taken in it of the statute 1617, c. 13., I think it proper to explain " the ground of my opinion.

" The institutional writers have been greatly at a loss to determine " what is the precise meaning and effect of the act 1617, c. 13., so as to " render it not inconsistent with the immediately preceding statute 1617, " c. 12. This last act provides, that men shall not be disturbed in the " enjoyment of their estates, who have bruiked or possessed them by virtue " of infeftments made to them by the King, or other superior or author, " 'for the space of forty years,' provided they can produce either a charter " preceding the entry of the forty years possession, with seisin on it, or " where there is no charter, instruments of seisin 'standing together for " 'the space of forty years, either proceeding upon retours or upon pre- " 'cepts of clare constat;' which rights are declared to be 'valid and " 'sufficient rights, being clad with the said peaceable and continual pos- " 'session of forty years, without any lawful interruption,' &c. The act " 1617, c. 13., on the narrative of the act 1494, by which summonses of " error against the determinations of inquests were declared to prescribe, " if not pursued within three years, provides that that act shall not prejudge " the nearest-of-kin to seek reduction of such retours within twenty years, " and that if the summons 'be not intented, executed, and pursued " within the space of twenty years,' &c., the action of reduction shall " prescribe, and no one be heard to insist in it.

" I cannot think that the second of these acts has an indiscriminate " application to all retours, or to all grounds of challenge, or that the two " acts can be reconciled, simply on the ground that the last relates only " to one of the titles mentioned in the first. For to say that two or more " infeftments, proceeding on a retour of service, and clad with forty years " possession (as equivalent to charter and seisin with forty years posses- " sion), shall secure the party against every challenge of his title—and to " say that a retour alone, with or without seisin, by the mere lapse of " twenty years, shall in every case secure a party against any challenge " of that title, appears to me to involve a contradiction in principle which " the framers of the first act cannot be supposed to have intended. And

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" pleaded for the defenders, and decern: Find expenses " due, and allow an account thereof to be given in, and " remit the same to the auditor, when lodged, to tax " and report."

The pursuer appealed.

Appellant's Argument.

Appellant.—The vicennial prescription of 1617, c. 13., was a mere extension of the triennial prescription of 1494, c. 57., and applies only to actions of error against the inquest. The statute 1617, in the immediately pre-

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" it farther appears to me, that such a construction of the act is not recon- " cileable with the opinions delivered in the case of Bargany.

" In general I think that the act, in the restraining part of it, was in- " tended to protect the parties once served against the necessity of again " producing, after twenty years, the proofs of their propinquity in blood " to the deceased. Taking this to be the effect of it, though it may also " protect against irregularities in the proceedings, I think, though with " difficulty, that it must secure the retour in this case against the parti- " cular ground of challenge brought against it. My cause of difficulty " is this:—The pursuer does not object to the statement of James Neil- " son's propinquity to John Neilson in Brownside, from whom he drew " his descent; he only says that that descent was through the second son " of John, while the pursuer is descended of Matthew, an elder son; and " if the direct case be put, that A. obtained a service as heir of his father, " and that after twenty years B., stating himself to be an elder son, " absent perhaps at the time, challenged the retour, I should have hesi- " tation in saying that the door was shut against his plain right by the " vicennial prescription. I am aware, however, of the case of Younger " v. Johnston, 22d November 1665, and what Mackenzie has said on it " in his supplemental note, and only mean to express a doubt on the " principle.

" But I am of opinion, that in this case the retour of James Neilson " is of such a nature, according to the statement in the record, as neces- " sarily to bring it within the statutory prescription. He is served " nearest heir as being the grandson of John Neilson: In this it is im- " plied, that his father was either the eldest son or the eldest who has " left descendants; and as the name of his father does not appear, the " ground of challenge set forth in the summons and record is truly an " impeachment of the propinquity on which he has been served. I " therefore concur with the other Judges in thinking, that in this case " the action is barred by the statute."

ceding chapter to that creating the vicennial prescription, renders it necessary that a party setting up a title against the true owner of land should have possessed upon the title set up by him for forty years. In the present case there has been no such possession. To hold then that a party who has simply expede a general service, without the adverse possession required by the twelfth chapter, is entitled to prevent the true owner from vindicating his right, would be to make these two provisions utterly inconsistent with each other, or, in other words, to make the provisions in the thirteenth chapter entirely supersede those of the twelfth, without the slightest apparent intention in the legislature so to do. But again, the nature of the service which was expede must be borne in mind. It was not a case of special service, where the party tries to connect himself with the lands. It was a mere general service, under which nothing is transmitted but personal rights to lands not clothed by infeftment. It is well known that these general services are almost invariably carried through without any opposition, or any one to watch the proceedings, and if they are not reducible after twenty years, there is scarcely an estate in Scotland which would be safe from this course of proceeding, and, at all events, the most serious consequences must follow. If, in a proceeding not watched, and having no other effect but to pass personal rights to lands, and not followed by any visible act of possession, all parties are excluded from challenging by the mere lapse of twenty years, the law of prescription would be a downright mockery. Indeed, it might actually happen that the true heir had had the possession during the whole twenty years, but from negligence or ignorance had allowed an inept retour to stand unreduced in the person of another.

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Appellant's Argument.

If a retour alone could be reared up into a valid title to the party served without further evidence or documents, what becomes of the well known maxim, "nulla sasina "sine nulla terra;" or what indeed becomes of the whole doctrine of the positive prescription of forty years? In fact, if the plea maintained on the other side were sustained it would annihilate the forty years prescription of land rights altogether.

The point in question was fully considered in the Bargany cause, and the dicta of the judges in that case entirely favour the view now maintained. A mere general service is not one of the rights forming the title to property, a sasine proceeding upon a retour as referred to in the statute is a sasine proceeding upon the retour of a special service; a general service is not in itself, like a special service, the warrant of sasine; and hence, even if the appellant should be held as excluded by the terms of the thirteenth chapter of the statute from reducing the general service in question, that would in no degree prevent him from challenging the sasine proceeding on the disposition and settlement executed on deathbed, unless forty years peaceable possession thereon can be established by his opponent.

Respondents Argument.

Respondents.—The words of the statute 1617, c. 13., either taken alone or in connexion with the terms of the act 1494, sufficiently demonstrate that their application was not limited to actions against the inquest for error.

The import of the 12th chapter of the statute of 1617, is to prevent the true owner of property from challenging a defective title, after the party having the defective title has been in possession, by virtue of a sasine or sasines for forty years. The import of the thir-

teenth chapter was simply to render the facts found by a jury under a service indisputable after the lapse of twenty years. The object of the statute introducing the prescription of forty years is the protection of land rights, and of the title by which lands are held against all objections whatever. The view of the statute is to render the whole title, after the lapse of the prescriptive period, unchallengeable upon any ground whatsoever. After the forty years have run upon the title, it is sustained by the law in the face of all alleged defects, and against all claimants whatsoever. The act requires an infeftment; and not only so, but an infeftment on a previous warrant. And although the act refers to sasines on retours, as well as other previous titles, it does so with no particular reference to the case of retours as such, but merely as the warrants of the infeftment; inasmuch as the act did not intend that a sasine without a warrant should be effectual, as the basis of prescription. If there has been a possession for forty years, upon an infeftment following on a regular warrant, whether retour or any other, the whole right to the lands stands secure by virtue of this act. But the other and separate statute now under consideration was enacted for a totally different purpose from that of introducing a prescription, by which the whole feudal title should be rendered secure against all objections whatever. It does not enact, nor was it intended to enact, that a retour with twenty years possession should give a title to lands incapable of being challenged upon any ground whatsoever. Except in its incidental and collateral results, the statute does not affect the feudal title to lands at all. All to which the statute has reference is the mere matter of propinquity, — an

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isolated fact, which may no doubt be intimately connected with the title to land, but may also, as in the case of peerages, and titles or offices of honour, be of vast importance even where no land is in question. And in regard to this fact, the statute declares, on motives of very obvious expediency, that if it is fixed by the verdict of a jury it shall be held after the lapse of twenty years to be fixed beyond challenge, against any person coming forward with an opposite allegation. Nothing is more alien to its words or manifest intention, than to say, that merely because the retour is unchallengeable on the point of propinquity, therefore the whole feudal title to the lands is, de plano, to become a valid heritable right. So far as the retour might be subject to challenge by a person claiming to be a nearer heir, that particular step in the progress is no doubt secured by the act. But all other objections to the title, of whatever kind they may be, remain open exactly as before, and will still do so, until the whole title becomes fortified by the long prescription.

There is not, therefore, the slightest collision between the act 1617, c. 12., introducing the long prescription of forty years, and the act 1617, c. 13., enacting the vicennial prescription of retours now contended for. The latter statute merely introduced a qualification on the immediately previous act, to the effect that where a service formed part of the feudal title, that service should, on a sound consideration of the fleeting nature of human testimony, be held after twenty years to be incapable of reduction, at the instance of any person, alleging that he himself, and not the person served, was the true heir. But to this effect, and to this effect only, does the last statute operate; and this plainly involves

no collision or contrariety between the two statutes, but leaves them to act in perfect harmony, according to the entirely consistent views of policy on which they were respectively framed.

Respondents Argument.

The Bargany cause, as observed by the consulted judges, clearly cannot have the slightest application to the present case; for there the parties, so far from disputing the retour, respectively founded upon the facts thereby found as the ground of their conclusions in point of law.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, the question in this case was, whether twenty years having elapsed after service of James Neilson of Newland Craigs, as heir to John Neilson of Linwood, there were any provisions under the Scotch acts, to which I shall have occasion to refer, that would bar the remedy of the present appellant, who now claims to be the true heir to that person.

It appears that John Neilson of Linwood, in the year 1802, executed a conveyance of certain estates to a person of the name of James Cochrane, a farmer at Linwood, upon trusts stated in the conveyance. From 1802 to the present time the parties claiming under this conveyance have been in possession of the property. But the question has arisen, whether this conveyance can be reduced, or whether the pursuer is not barred from reducing it by the effect of prescription.

In 1809, James Neilson of Newland Craigs claimed to be the heir of John, and if so, he was the person authorized to dispute the title. He was served heir to John, and retoured as such. Having so far established his title as heir, he confirmed the deed. This was in

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1809, and in 1833, the appellant setting up his claim as heir to John, got himself served heir, and instituted the action out of which the present appeal has arisen, for the purpose of reducing the service in 1809, being then above twenty years standing.

My Lords, by a Scotch act, in 1494, only three years were allowed to a party to dispute the service of another as heir to a person deceased; and that was to be done under a process then existing, which was a process of error imputing to the jury that they had returned an illegal and unfounded verdict, so that the jury themselves might upon that process come in and defend the verdict. If there was error in the verdict, the effect of this process was to get rid of it, or, according to the terms of the Scotch law, to reduce the retour of the service, that is, the verdict of the jury retoured or returned to chancery.

In 1617, by the 13th chap. of the statutes of that year, the period of three years was maintained so far as regarded the proceedings against the jury; but a different period was adopted for the purpose of questioning the title of the party himself who had been served heir, and twenty years were allowed for that purpose. By that statute, therefore, the term of twenty years was given to a party, if he claimed as nearer heir to reduce the service and retour of another person who had served as heir. This act was passed in terms new at that period; it introduced the phrase "reduction of retour;" and this is the act under which the present process was instituted.

In this case then the question is, whether the pursuer (appellant) is not met by the provision of this act. The argument raised in support of the claim of the appellant

was, that although the terms of the 13th chap. of the act 1617, taken by themselves, were nearly free from ambiguity, still that the 12th chap. of the statutes of the same year, passed upon a similar subject, was inconsistent with chap. 13., and that the same construction ought to be put upon the provisions of that act as on the other, or according to some part of the argument adduced, that the provisions of the 13th chap. ought altogether to be disregarded. If, my Lords, it had been the case that there was any inconsistency in the two statutes, according to the ordinary rules of construction of statutes, the last enactment would of course have prevailed; if the provisions of the 13th chap. were inconsistent with the provisions of the 12th, the 12th must have yielded to the 13th, rather than the 13th to the 12th. But I do not find that there is this inconsistency in the provisions of the two acts.

Chapter 13th provides for something distinct from that which has been provided for in chap. 12. In chap. 12. the words are, "that they (that is the parties "in possession) show and produce instruments of seisin, "one or more, continued and standing together for the "space of forty years, either proceeding upon retours "or upon precepts of clare constat," which the statute declares shall be a good title against all persons whatever. There must, therefore, under this statute be not only a possession of forty years, but a possession with an ostensible ground of title; there must be that which would in this country be called an adverse possession, that is a possession hostile to the party claiming the right to the same, having its origin in a title hostile to the right of the party claiming; and this will make a title against all the world. The provisions of the

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13th chap. seem to me to be quite consistent with that title being good against all the world. By the 13th chap. it is only provided that the party served heir shall not be disturbed in his rights as heir after twenty years, by any action brought by another person claiming only to be heir. But the heir may be disturbed by any person who comes in with a stronger title than that of mere heirship. It is quite consistent that those two parties, as between themselves, may be precluded from disputing as to their title after twenty years have elapsed, and yet that another party should not by means of possession adversely acquire a title against all the world till the expiration of forty years. The statute in chap. 13. only provides that quoad the heirship, the service and retour by one party quà heir shall not be disputed by another party who merely comes in quà heir. It is not putting a forced construction upon one or other of those statutes to say, that they are consistent with each other, indeed it seems to me, that this is the obvious import of the words of the two statutes taken together.

My Lords, in the present case we have a party who was retoured heir in 1809, and an act done by him upon that retour, viz. the ratification of a conveyance by his ancestor to a third party, and possession under his assent by the party to whom the deed of conveyance was made. Although the present pursuer may claim by title paramount, the question is, whether under those circumstances he can, in the character of heir, come in and dispute a title of this nature.

As to the consistency of the two chapters of the statute, I do not think that any doubt whatever can exist. But it was said that this 13th chap. of the act related

only to a special, service and not to a general service. It was so said; but it was proved to demonstration, that anterior to this period general service was in use. I think, therefore, that this act must be taken to apply to the law as it existed in practice at the time of its enactment, and must be considered as extending to any proceedings by which a party might be served as heir.

The provisions of these statutes of 1494, and 1617, chap. 13., have also had this objection made to them, that there have not been any decisions founded upon them. That is true, but there are various writers, who from time to time have published works upon the law of Scotland, who have spoken of this distinction between special and general service; and there are some text writers who say that these statutes apply to every species of service. Lord Bankton is one of those; he says that they apply to general service.

I have not found any authority, by which the claim of the appellant can be supported. But then it is said that in the Bargany case[1] there were observations of the judges which supported the appellant's view of the matter. These observations did not fairly arise from the subject matter of adjudication; the case itself proceeded upon a totally different ground. That there was nothing in the case to support the position alluded to was apparent from the answer to a question which I put to the counsel at the bar.

Then, my Lords, it was said that the act of 1617, chap. 13., must be considered as applying only to the species of process which at that time existed, namely, to the prosecution of the jury for an erroneous conclu-

[1] See cases cited, at end of Rep.

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sion. I do not find any ground in the statute for that argument; on the contrary, I find that the statute expressly distinguishes and separately provides for both cases; it gives the opportunity for twenty years of instituting proceedings for the purpose of reducing the retour, but it gives him three years only for the purpose of instituting this proceeding against the jury. With respect to that proposition, I have also carefully looked through the text writers that have been referred to, for the purpose of seeing whether in those text writers there was any thing to support it, and I can find no allusion to it.

Then it was said, that in order to entitle the party to this defence, he must have what was called possession, by which I understood the learned counsel to mean, not mere possession, but possession under a feudal title, that is to say, he must have made up titles under the service as heir. My Lords, there is not only nothing to support that, but there is the authority of Lord Bankton against it, who states that possession is not necessary.

It is very true, that cases are referred to in the papers, and were suggested at the bar, in which it might be matter for serious consideration, how far a party should be entitled to make an unfair use of the statute, that is to say, where some unjust advantage by concealment or otherwise may have been taken of the true heir. My Lords, if that case should arise, it would be your Lordships duty to put a reasonable and proper construction upon the statute to meet the case presented; but there is no such circumstance in this case, and your Lordships are not therefore called upon to give any opinion upon the subject. (Here his Lordship stated particularly the facts of the case.)

In the absence, therefore, of all authority against the prescription, looking to the plain terms of the act which gives the prescription, and coupled with the circumstances of the case, and weighing the arguments and observations which have been made against it, I trust your Lordships will be of opinion, that (without going further in order to state any opinion as to other circumstances that may arise) the decision of the Court of Session is correct, and that your Lordships will, therefore, affirm this interlocutor, and affirm it with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the respondents the costs incurred in respect of the appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Appellant's Authorities. — Stat. 1617, cc. 12. and 13.; Ersk. b. iii. 8. s. 65. 66. and 67.; Stair, b. iii. tit. 5. s. 35.; Bargany Case, 1 W & S., App., 410, 428; Stat. 1471, c. 47; 1494, c. 57.; Balf. Pra. 420, 421, and cases cited; Acts of Sederunt, 31st July 1630, (see recent edition of A. S. by W. Alexander, Esq.); Reg. Majest. buke i. ch. 14.; 2 Dallas's Styles, 596; Stair, b. 3. tit. 5. s. 42. and 43.; Act of Estates of Scotland, 1689, c. 18.; Colville v. Herd, 16th Feb. 1627, Mor. 2704; Muirhead v. Lichton, 2d Feb. 1632, Mor. 2705, Mitchelson v. Mitchelson, 4th Jan. 1677, Mor. 2706; Mow. v. Duch. of Buccleugh, 7th July

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1663, Mor. 2705; Hume, 28th June 1667, Mor. 2706; Cochrane v. Ramsay, 4 W. & S. 135; Spottis. 363; Kames's Eluc., art. 15, p. 98; Balf. 147, c. 6., and cases cited; Stair, b. 2. tit. 12. s. 15.; Ersk. b. iii. tit. 6. s. 2.; More's Note AA, p. 271, App. ed. of Stair; W. Bell's Dig. Vic. Pres. Eddington, 24th July 1672, Mor. 11292, Ersk. b. iii. tit. 7. s. 41.; Wilson v. Innes, 2d Feb. 1705, Mor. 10974 and 11330; M'K. Inst. b. iii. tit. 8. s. 164; Ersk. b. iii. tit. 7. s. 39.

Respondents Authorities. — 2 Bank, 165, s. 15.; Brown's Synop. 80; Grounds and Warrants, Mor. 3199, 5165; Stair, b. iii. tit. 5. s. 43. 44. 45.; Ersk. b. 3. tit. 8. s. 71.; 1 Jur. Sty. 571; Younger v. Johnstone, see Rep. of Stair, Gilmore, and Newbyth, in Mor. 10924, 10929; Ersk. b. iii. tit. 7. s. 39.; Edinglassie, Mor. 10987; Birkhill's Creditors, 5th July 1742; Elch., voce "Service of Heirs," No. 3.; ibid. voce "Succession," No. 7.; Skene de verbor. signif., voce "Service."

HAY and LAW — ARCHIBALD GRAHAME, Solicitors.

[*26th May* 1840.]

GEORGE CREIGHTON, Appellant.[1] (No. 6.)

[*Attorney General* (*Campbell*) — *James Anderson.*]

ROBERT RANKIN, Respondent.

[*Lord Advocate* (*Rutherfurd*) — *Sir W. Follett.*]

Cautioner. — Circumstances in which held (affirming the judgment of the Court of Session) that a cautioner had not been discharged from his obligation in respect of the conduct of the obligees in reference to the principal; and observed, per Lord Chancellor, "The case of M'Taggart "(1 Sh. & M'L. 553.) is of the highest importance, as it "makes the rule applicable to such cases (i. e. suretyship obligations) "the same in Scotland as in England. Upon "the rule in England there is no doubt. It is familiar to "every lawyer, and I am glad to be able to expound it in "the terms which a judge of the highest authority (Lord "Eldon) has laid it down, and which I think entirely "correct. The rule is this, 'that if a creditor, without "'the consent of the surety, give time to the principal "'debtor, by so doing he discharges the surety, that is, "'if time be given by virtue of positive contract between "'the creditor and principal, not where the creditor is "'merely inactive.'" (See p. 133.)

Process — Practice. — A summons before the Sheriff Court stated, that one of the defenders, a cautioner, together with the principal and other cautioners, had been applied to for payment, and had refused, unless compelled, and then omitting the name of the said defender, but stating the

[1] 16 D., B., & M., 447; Fac. Col., 18th Jan. and 6th Feb. 1838.

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name of the principal and of the other cautioners, concluded "that the said principal and cautioners foresaid" might be decreed to pay. To this summons the said defender appeared, and put in defences, and did not raise any objection to the summons on this ground. After his death his representative sisted himself as a defender, but did not raise the objection, and a decree for payment was pronounced against him. Held (affirming the judgment of the Court of Session in an advocation,) that there was no ground, under the circumstances, for setting aside the proceedings.

Title to pursue.—*Statutes 4 Geo. 4. c. 49. and 1 & 2 Will. 4. c. 43.* (*General Road Acts.*) Held, on construction of the General Road Acts, that when a road is divided into districts assigned to committees of trustees, the clerk appointed for any district is entitled to sue under the 16th section of the statute 1 & 2 W. 4. c. 43.

Title to pursue—Assignation.—Question, Whether, by the law of Scotland, one party can enable another to maintain a suit in his own name, while the property in the subject matter of the suit remains in the party giving the authority to sue. (See p. 128.)

BY the late General Turnpike Road Act for Scotland (4 Geo. 4. c. 49.), the enactments of which are, by section 2., extended to all local turnpike acts, it is, inter alia, provided, under the tenth section, "That "the trustees acting under any turnpike act shall "have power at any general meeting to divide the "roads comprised in such act into districts, to name "committees of their number for the more immediate "direction and management of particular parts of "such roads, and to give such committees (whereof "three may be a quorum) such instructions and such "powers as they shall from time to time think fit and "expedient."

By the eleventh section it is, inter alia, enacted, "That "it shall be lawful for the trustees acting under any "turnpike act, at any general meeting, to appoint a "clerk and treasurer, and also to appoint, if they shall "think fit, a superintendent for all or each or any "part of the roads within their trusts, with remune- "rating salaries, &c.; and that they shall also have "power in their district and committee meetings to "appoint clerks, collectors, treasurers, superintendents, "surveyors, and other officers, with reasonable salaries "or allowances for their trouble."

By the twelfth section provision is made, inter alia, "That the trustees of every turnpike road shall take "sufficient security from the treasurer appointed by "them for the due and faithful execution of his "office."

By the fourteenth section of the act it is enacted, "That all orders and proceedings of the trustees of "every turnpike road, together with the names of the "trustees present at every meeting, shall be entered in "a book to be kept by the clerk to the said trustees for "that purpose, and be signed by the preses of the "meeting at which such orders or proceedings shall be "from time to time made or had."

And by the fifteenth section it is further enacted, "That the trustees of every turnpike road shall direct "a book to be provided and kept by their clerk or "treasurer for the time being, in which book such clerk "or treasurer shall enter true and regular accounts of "all sums of money received and expended on account "of the road for which such clerk shall act, and of the "several articles, matters, and things for which such "sums of money shall have been disbursed;" and

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certain penalties are imposed upon the clerk or treasurer refusing inspection of such book, or otherwise contravening the statutory provisions in regard thereto.

The above statute is repealed by 1 & 2 Will. 4. c. 43., together with other statutes, "in so far as they relate to "turnpike roads and keepers of toll bars," but they are declared to remain in force as to all other roads not being turnpike. The sections above quoted are in substance re-enacted by the 9th, 10th, 11th, 14th, and 15th sections of 1 & 2 Will. 4. c. 43., and by section 16. thereof it is enacted, "That the trustees of every turn- "pike road may pursue and be pursued in all actions "or processes in the name of their clerk or treasurer "for the time being; and that no action or process, "brought or commenced by or against any trustees "of any turnpike road by virtue of this or any other "act of parliament, in the name of their clerk or "treasurer, shall cease by the death or removal of such "clerk or treasurer, or by the act of such clerk or trea- "surer without the consent of the said trustees; but "that the clerk or treasurer for the time to the said "trustees shall always be deemed to be the pursuer or "defender (as the case may be) in every such action or "process: provided always, that all expenses of process "or proceedings so incurred by such clerk or treasurer "shall be reimbursed and paid out of the trust funds of "the turnpike road for which he shall act."

By section 17. it is enacted, "That all such officers "as shall be appointed by the trustees of any turnpike "road shall, as often as required by the trustees, render "and give to them, or to such person as they shall for "that purpose appoint, a true, exact, and perfect "account, in writing under their respective hands, with

" the proper vouchers, of all monies which they shall " respectively, to the time of rendering such accounts, " have received, paid, and disbursed by virtue of this or " any turnpike act, or for or on account or by reason of " their respective offices; and in case any money so " received by any such officer shall remain in his hands, " the same shall be paid to the trustees, or to such per- " son as they shall in writing under their hands autho- " rize and empower to receive the same."

By section 18. it is, inter alia, provided, " That the " trustees of every turnpike road shall and they are hereby " required, either by themselves or some committee of " their number, annually to examine the vouchers, and " audit and settle the accounts of the respective clerks " and treasurers appointed by them, and to examine into " the state of the revenues and debts of the several " roads for which they act, and to make up abstracts of " such accounts, which abstract shall contain a state- " ment of the revenues and debts of the trust, and also " an account of all bonds given by the trustees, &c., " which said abstracts of accounts and statements shall " be signed by not less than three of the trustees."

The 109th section authorizes the procurator fiscal, the trustees, or any person authorized by them, to sue for penalties.

By the subsisting road act for the county of Ayr, passed in 1827, it is enacted, by section 22., " That the " trustees who shall be appointed for the special care " and management of any district or particular roads " shall be subject to the control of the general meetings " of the trustees appointed by this act for their proceed- " ings in the matters committed to them, and shall be " accountable to the said general meetings for their

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"intromissions with the revenues and management of "the affairs of such district or road; and for these pur- "poses they shall, on or before the 31st day of July "yearly, transmit to the clerk of the general meetings "a state of the revenues of such district or road, and of "the expenditure thereon, and an account of all other "transactions for the year ending on the 26th day of "May preceding; also a list of all debts affecting the "same, in order that the same may be laid before the "general meeting on the first Wednesday of August "yearly, under a penalty not exceeding 5*l.* sterling."

And by the twenty-third section of the same act it is enacted, "That all such accounts so laid before "the general meeting shall under their authority be "examined, audited, and reported to a subsequent "general meeting, by whom the same shall be finally "settled; and the clerk to the general meetings of "the trustees appointed by this act shall, on or be- "fore the first Wednesday of November yearly, make "up an abstract from the committee's report of the "whole accounts which shall have been transmitted to "him, showing the revenues of each road, and expen- "diture thereon, the amount of the whole debts affect- "ing the same, and such other particulars as the said "trustees shall from time to time direct; which abstract "shall be laid before the meeting to be held on the "said first Wednesday of November, and shall be open "for the inspection and perusal of the creditors on the "tolls authorized to be levied by this act," &c.

At the first meeting of the trustees under the local act, held at Ayr, 11th July 1827, authority was given to the committees appointed for the management of the different lines of road under the act to continue their

management, taking along with them the new trustees appointed by that act, and recommending to the former conveners to call meetings for the purpose of appointing clerks, cashiers, and collectors. In virtue of this authority a meeting of the trustees for the district of Lochlibo was held at Beith upon the 27th July 1827, when Robert Rankin junior, writer in Irvine, was appointed treasurer of that district; and upon the 2d of August 1827 a bond was granted in the following terms:—

"We, Robert Rankin junior, writer in Irvine, as "principal, and Robert Dunlop, merchant in Irvine, "and Patrick Creighton, tanner in Kilwinning, con- "sidering that in pursuance of an act passed in the "eighth year of the reign of his present Majesty "George 4., intituled 'An act for repairing and "'keeping in repair the turnpike roads in the county "'of Ayr; for making and maintaining certain new "'roads; for rendering turnpike certain parish roads; "'and for regulating the statute labour in the said "'county,' the committee of trustees on the road "leading from the road from Irvine to Stewarton at "the Girdle, and passing by, at, or near Doura and "Mountgreenan, and alongst the Lugton, to the "extremity of Ayrshire near Lochlibo, at a meeting "held at Beith on the 27th day of July last, did elect, "nominate, and appoint me the said Robert Rankin "junior to be their treasurer in time coming there- "after during their pleasure, and conditionally that I "should find caution as after mentioned, as a minute "of the date foresaid more fully bears: Now wit ye "us, the said Robert Rankin junior as principal, and "the said Robert Dunlop and Patrick Creighton as

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"cautioners, to have bound and obliged, likeas we, by "these presents, bind and oblige ourselves, jointly and "severally, and our heirs and executors, that I the "said Robert Rankin junior shall not only duly and "faithfully execute the said office of treasurer, but also "from time to time, and as often as may be required, "hold just compt, reckoning, and payment to the said "trustees, or quorum of them, of my intromissions with "the funds of the said road, and any other road which may "be put under the management of the said committee, "and of all monies that shall be paid over to me, as "treasurer foresaid, so long as I shall be continued in "office, and particularly that all monies to be received "by me shall from time to time be lodged in a bank "in an account current, to be opened in my name for "behoof of the said road, and that I shall at no time "keep in my hand more than 20*l.* for answering con-"tingencies; all this under the penalty of 200*l.* ster-"ling attour performance; and I the said Robert "Rankin junior hereby oblige myself and my foresaids "to free and relieve, and harmless and skaithless keep, "my said cautioners of their cautionry obligation for "me in the premises, and of all damages and expenses "they may any way sustain or be put to thereanent: "And we consent to the registration hereof in the books "of council and session, or other judges books, therein "to remain for preservation, and that letters of horn-"ing on six days charge, and all other execution "necessary, may pass on a decree to be interponed "hereto in common form."

A general meeting of the county trustees was held at Ayr on the 1st of August 1827, at which the permanent nomination of trustees for the special manage-

ment of districts took place, and the Lochlibo district trustees were appointed to take charge, among others, of the Lochlibo and the Monkredding roads.

Rankin continued treasurer till the beginning of June 1833, when he absconded, having trust funds in his hands to the amount of about 367*l.* 6*s.* 8*d.*, on account of the Lochlibo road.

The annual meeting of the road trustees for the Lochlibo district was held at Beith, 14th June 1833, and the minutes thereof bear that,—"Mr. Brown stated to "the meeting, that Robert Rankin junior, treasurer to "this trust, had absconded from Irvine, with his family, "ten or twelve days ago, without giving up the books and "vouchers belonging to the trust, which are understood "to be in his repositories at Irvine, and moved that the "duties of the office of treasurer be discharged in future "in terms of the act 1 & 2 W. 4. c. 43. s. 12. The meeting having learned that the treasurer's absconding is "matter of notoriety, instruct Robert Rankin, writer in "Irvine, the clerk, to take such measures, judicial or "otherwise, as may be necessary for obtaining possession "of the books, vouchers, and other papers belonging to "the trust which were under the charge of the treasurer. "The meeting also unanimously agree to the motion of "Mr. Brown, and authorize the clerk to uplift and discharge the balance due to the trust by the treasurer; "and to uplift from the bank any funds which may "there be deposited in his name, and if necessary to sue "the treasurer and his cautioners for any defalcation "there may be, also to uplift and discharge all other "monies due and to become due to the trust."

Robert Rankin raised an action before the Sheriff of Ayrshire (6th July 1833), setting forth his title to

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pursue as "clerk of the committee of road trustees for "the Lochlibo district, as representing the said com- "mittee, and duly and specially authorized by a general "meeting thereof, held at Beith on the 14th day of "June 1833, to raise and pursue the action after men- "tioned, conform to certified extract of the minutes "herewith produced, upon and against Robert Rankin "junior, writer in Irvine, as principal, and Patrick "Creighton, tanner in Kilwinning, and Mrs. Mary "Hutchison or Dunlop, relict of the deceased Robert "Dunlop, merchant in Irvine, and Jane Dunlop, re- "siding there, his daughter."

The summons then set forth the obligation said to have been contracted by the bond of caution, and concluded that "the said Robert Rankin junior, as prin- "cipal, and Mrs. Mary Hutchison or Dunlop, and "Jean Dunlop, representatives of the said deceased "Robert Dunlop, as cautioners, defenders, ought and "should be decerned and ordained, jointly and seve- "rally, by decree of me and my substitute, to exhibit "and produce in process a full and particular state of "the said Robert Rankin junior's accounts," &c. "and "the said defenders, as principal and cautioners fore- "said, ought and should be decerned and ordained, "jointly and severally, by decree foresaid, to make pay- "ment to the pursuer for behoof of the said committee "of trustees of the sum of 1,000*l.* sterling, or of such "other sum as shall appear in the course of this process "to be the balance due by the said Robert Rankin "junior, as treasurer aforesaid, to the said committee "of road trustees, with the legal interest thereof from "the date of citation to this action, and in time coming "till paid." Then follows a conclusion against "the

"said defenders" for the penalty in the bond, and expenses of process.

Although the name of Patrick Creighton was omitted as above in the conclusion of the summons, the summons was served on him personally.

The summons was also executed at the dwelling house in Irvine of the principal debtor, Robert Rankin junior, which was shut up, the messenger's execution bearing that a copy had been left "in the key hole of the most "patent door of the said Robert Rankin junior's dwel- "ling house in High-street of Irvine," and he was cited on an induciæ of seven days.

Creighton alone lodged defences to the action, stating preliminary objections, (1) as to the title of the pursuer; and (2) want of jurisdiction over the principal debtor; but without noticing the objection in respect of the omission of his own name as a defender in the conclusion of the summons.

Thereafter, 6th July 1833, Robert Rankin raised a supplementary action specially against Patrick Creighton, on the same grounds as in the original summons, and it was also stated, that "by a clerical error in the sum- "mons, the omission of the name of the said Patrick "Creighton in the conclusions, the same was ineffectual "against him for obtaining decree against him as cau- "tioner, and it therefore becomes necessary," &c.

Patrick Creighton gave in defences to the supplementary action, after which the sheriff remitted the supplementary action "to the original action presently "depending in this Court, ob contingentiam." No interlocutor of conjunction was pronounced.

Thereafter the sheriff substitute by interlocutor, adhered to by the sheriff on appeal, repelled the objec-

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tion as to Robert Rankin junior not being properly cited to this action; and also the objection to Robert Rankin's title to pursue.—At that stage of the proceedings, Patrick Creighton having died, the appellant George Creighton, his brother, was sisted as a defender in his place.

A record was thereafter made up, and on 15th December 1835 the sheriff substitute pronounced the following interlocutor, adhered to by the sheriff on appeal:—"Having considered this process, with the "writings produced, finds it averred by the pursuer, "and not denied by the defender, that the treasurer's "accounts were regularly and yearly lodged with the "pursuer, as district clerk of the road trustees, from "his appointment in 1827 until the year previous to "his elopement in the end of May, or beginning of "June 1833, and that the same were examined and "docqueted by the trustees, and afterwards by a committee appointed by the general meeting, by whom "the same were passed from year to year: finds that "the cautioners were bound, with the treasurer Robert "Rankin junior, that he should not only duly and "faithfully execute the said office of treasurer, but also "from time to time, and as often as might be required, "hold just compt and reckoning and payment to the "said trustees, or quorum of them, of his intromissions "with the funds of the road mentioned in the extract "bond produced, and any other road which might be "put under the management of the said committee, "and of all monies that should be paid over to him as "treasurer foresaid, so long as he should be continued "in office, and particularly that all monies to be "received by him should from time to time be lodged

"in a bank in an account current to be opened in his "name, for behoof of said road, and that he should at "no time keep in his hands more than 20*l.* for answer- "ing contingencies: finds, therefore, that it was the "duty of the cautioners to see that the said Robert "Rankin junior duly and faithfully executed the "duties of his office of treasurer by accounting for his "intromissions, and complying with the terms of the "bond which they came under: therefore repels the "defences for the compearer and defender George "Creighton, as to his liability as representative of the "original cautioner and defender Patrick Creighton, "and ordains him to give into process, within fourteen "days from this date, any objections which he may "have to the states, Nos. 1. and 2. of inventory of pro- "ductions, and vouchers therewith produced."

The amount of the treasurer's intromissions, for which he and his cautioners were found liable, was afterwards fixed at 367*l.* 6*s.* 8*d.*, for which sum, with interest and expenses, decree was pronounced by the sheriff.

Creighton, the appellant, advocated, and pleaded, inter alia,—The respondent had no title to sue as clerk to district road trustees: It is only either the clerk or the treasurer to the general road trustees of the county that is authorized to sue and be sued for behoof of or as representing his constituents (1 & 2 Will. 4. c. 43.; Williamson v. Goldie, 2d March 1832): The directions which a meeting of the committee of the district road trustees are said to have given to the respondent merely amounted to an authority to bring an action otherwise competent and legal, and did not vest any right or title in the respondent himself to pursue at his own instance: There were no termini habiles for pro-

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nouncing decree against the advocator, under the conclusions of the original action: The supplementary action afterwards brought by the respondent had not the effect of making the advocator a party to the original action, or of validating the procedure against him, in respect these actions never were conjoined; and, separatim, previously to the date of the decree the supplementary action was asleep: The advocator's brother, in the circumstances appearing on the record, was liberated from his cautionary obligation, in respect that the trustees who took the security violated their duties towards the cautioners under the bond, statutes, resolutions, and directions of the general road trustees; (2d) in respect of their gross negligence and connivance with the principal debtor, in retaining the trust funds and otherwise, as appearing from the record and productions; (3d) in respect of their not having intimated the deviations and omissions of the principal debtor to the cautioners, or required them to cause the monies retained to be deposited, till long after the principal debtor had become bankrupt and absconded: The obligation of the advocator's brother, as cautioner, did not, under the species facti of the case, extend to the claims of the respondent sought to be enforced.

Rankin, on the other hand, pleaded,—The title to pursue libelled on in the summons was justly sustained by the sheriff, especially having regard to the terms of the bond upon which the action is laid, and the provisions of the road acts: The decree pronounced on the merits against the advocator was in all respects regular, and no well-founded objection exists to that decerniture, either upon the ground of want of conjunction of the supplementary with the original pro-

cess, or upon any other formal or technical ground: The supplementary action having been remitted to the original action ob contingentiam, and having been thereafter held and recognized by the parties as part of the proceedings in the cause, and more especially the advocator's predecessor having entered on the merits, and gone to issue with the pursuer, and the advocator himself having afterwards sisted himself as defender, in room of his brother, deceased, any objection otherwise competent, on the ground of there having been no formal or express conjunction of the actions, is not now pleadable by the advocator: At any rate, in the state of the pleadings, and in the whole circumstances, no such objection can now be maintained; the two actions, being both advocated and in this court, may yet be conjoined, if necessary, or at all events further procedure ought to be sisted till the objection in form has been effectually remedied: There are not termini habiles for the objection pleaded by the advocator, that the supplementary summons was asleep before decree was pronounced; Ferrier v. Ross, 7th March 1833; or for the objection that all parties are not duly called: The advocator was justly held liable for the intromissions with the road funds of Robert Rankin junior, in manner and to the extent found by the sheriff's interlocutors, which are in all respects just and well founded: No sufficient or relevant defence in law has been stated, or exists in the facts of the case, to liberate the advocator from his obligation as representing his brother, the original defender, on the ground either of violation of duty, negligence, want of due intimation, or mora on the part of the road trustees.

The Lord Ordinary, after hearing parties on the

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closed record, ordered cases, with which his Lordship made avizandum to the Court, adding to his interlocutor the subjoined note.[1]

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[1] "*Note.*—The Lord Ordinary thinks this case attended with some "difficulty, both as to the preliminary points and the merits; and as the "cases are already printed with an obvious view to an ultimate judgment "of the Court, he thinks it best to put it in the way of such a decision, "with as little delay and expense as possible. He has not of course "formed any decided opinion, but shall state generally the views which "have occurred to him.

"As to the respondent's title to pursue as a district clerk under the "general road act, the Lord Ordinary is rather inclined to support the "title, on the grounds stated at p. 10 et seq. of Rankin's case. The "case of Williamson, however, he thinks was rightly decided in the cir-"cumstances which there occurred; and though the opinions ascribed to "the judges in the printed report appear to go upon a more general "view, he has a strong impression that they should be understood as "referring to these circumstances. As it is very important, however, "that the point should be finally settled, the doubt which he humbly "entertains as to the larger application of these opinions would of itself "have determined him to report the cause without a decision.

"The Lord Ordinary is also inclined to support the pursuer's title, on "the special mandate or authority contained in the minute of the trustees "of 14th June 1833, by which he is expressly empowered and directed "'to uplift and discharge any balance due by the treasurer, and, if "'necessary, to sue him and his cautioners for the amount.' The advo-"cator represents this as a mere mandate to a law-agent to raise an action "for his employers; in which, of course, the only competent pursuers "would be the employers, and not the agent; and from the want of any "express direction to sue in his own name, the matter is no doubt "attended with some difficulty. The Lord Ordinary, however, must "observe, 1st, That the authority is plainly given to the respondent, "not as a law agent, or with a primary view to litigation, but as their "clerk or attorney, and in order that he might himself act on "their delegated authority; and, 2d, That there is accordingly an "express power, not only to require payment of the balance, but to "discharge it, which of course he could only do by a receipt signed by "himself as commissioner and attorney, or per procuration of the "trustees; and consequently that the alternative authority to sue, if "payment could not be obtained extrajudicially, must be held to have "been granted in the same character. The parties may look upon this "point to the cases of Wilson, 8th February 1822 (1 Shaw, 304); "Gemmel, 19th November 1830 (9 Shaw, 33); Low, 1st June 1826 "(4 S. & D. 651); and Oswald, 17th February 1827 (5 Shaw, 381).

"As to the alleged nullity of the whole proceeding, in respect of the "omission of Creighton's name in the conclusion of the original action,

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At the advising before the Inner House, (counsel having left the cause upon the argument in the printed cases), the Lords of the Second Division, 18th January 1838, pronounced the following interlocutor: — "The

"there is also very considerable difficulty; but the Lord Ordinary, on "the whole, and chiefly on the strength of the decision in the case of "Boyd, 20th January 1832 (10 Shaw, 213), and on the grounds stated "in Lord Glenlee's opinion in that case, would have been disposed to "overrule that objection. As things now stand, he is of opinion that "the respondent can get no aid from the supplementary action, though "it may still be competent for him to waken it, and advocate ob con-"tingentiam.

"On the merits the Lord Ordinary is disposed, though with great "hesitation, to go into the views of the advocator. The omission of the "trustees to require the treasurer to lodge the money drawn by him "regularly in the bank might not perhaps have been sufficient to liberate "the sureties; but what weighs with him is their neglecting, at the "successive audits, either to require actual payment to themselves of the "growing balances in his hands, in terms of the 17th section of the act, "or at least to direct and enforce the application of these balances, after "reserving what might be immediately necessary for outlay on the road "towards payment of the heavy accumulating interests on the large debts "with which they were burdened, and which they had been urgently "required by the general body to keep down by such an application. "The Lord Ordinary does not adopt the advocator's construction of the "17th section to the full extent of holding that every farthing in the "hands or bank account of the treasurer must have been paid over at "every audit, although the necessary outlay on the road might have "required the greater part of it to be instantly paid back to him. He "thinks, on the contrary, that a reasonable sum for meeting current "expenses might and indeed ought always to have been left. But if "the statements at the bottom of page 34 and top of page 35 of "Creighton's case are at all correct (and from any view the Lord Ordi-"nary has been able to take of the account in process he is disposed to "think they are so), he apprehends that under the true meaning of that "section, as well as by the express direction of the general trustees, the "district committee was bound to have taken out of the hands of their "treasurer by far the greater part of what they improperly left with him; "and that in so conducting themselves they violated both an express "injunction of the statute, and a very plain and obvious duty as at com-"mon law; and therefore, and without questioning the authority of any "thing said or decided in a higher quarter in the recent case of M'Tag-"gart's trustees, the Lord Ordinary must think that they have given the "cautioners a fair ground for maintaining that they have been relieved of "their responsibility."

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"Lords having advised the cause, and heard counsel "for the parties, repel the objection to the title of the "pursuer, and the other objections stated by the advo- "cator to the regularity of the proceedings in the "inferior court; and on the merits, before answer, "allow the advocator within eight days to lodge a "minute, and state in figures the amount of the balance "at the last audit of the treasurer's accounts in the "year 1832; and allow the respondent to answer the "same, if necessary, within eight days thereafter."

A minute and answers having been lodged, their lordships thereafter (6th February 1838) pronounced the following interlocutor:—"The Lords having advised "the cases for the parties, and whole process, and heard "counsel for the parties, repel the reasons of advocation, "adhere to the interlocutor of the sheriff submitted to "review, remit simpliciter to the sheriff, and decern; "find expenses due; allow an account to be given in, "and remit the same, when lodged, to the auditor to "tax and report."

The defender appealed.

Appellant's Argument.

Appellant.—1. The respondent must, in support of his title to pursue, necessarily found either upon the provisions of the general and local road acts, or on the terms of the minute of his appointment. The instance cannot be supported on statutory authority, (and accordingly it is not so put in the summons), inasmuch as it has been decided by the Court in Williamson v. Goldie[1], "that the provision in the Turnpike

[1] 10 S., D., & B., 413.

"Act, that the road trustees may legally sue or be sued "in name of their clerk, is not applicable to district "clerks, but only to the clerk under the general trust," and that decision has since been approved by the Court in the present case. The respondent, then, who was not the clerk to the general body of the road trustees, could not assume statutory powers. The minute of June 1833 does not warrant an action being brought in the respondent's own name, as representing the committee of trustees, for a debt which was vested in those trustees, and which they had not assigned to him; and no such title as that of assignee, either absolutely or in trust, had been conferred by the trustees upon the respondent. The cases referred to by the Lord Ordinary[1] are not adverse to, but rather support, these views. In the case of Low v. Lord Arbuthnot[1] the action was brought by some of a committee of trustees forming a quorum, and even there the objection was repelled as having been taken too late.

2. The omission of Patrick Creighton's name in the conclusions of the summons, although it might have proceeded from clerical mistake, could only be remedied by a supplementary process, if duly conjoined with the original; and where no such conjunction takes place, by abandonment of the former action, on paying costs, and bringing a new process.[2] The supplementary action, although narrated in the advocation, was not and could not have been advocated, an amend-

[1] Wilson v. Kippen, 8th Feb. 1822, 1 S. & D. 304; Kippen, &c. v. Wilson, &c., 7th June 1823, 2 S. & D. 378; Low v. Arbuthnot, 1st June 1826, 4 S. & D. 651; Oswald v. Lawrie, 17th Feb. 1827, 5 S. & D. 381 Lawson v. Gordon, 7th July 1810, Fac. Coll.

[2] 6 Geo. 4. c. 120. s. 10.

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ment by minute or by supplementary process being incompetent after the record is closed.[1] The compearance of the appellant in the original action in place of a party not called by the summons in that action cannot obviate the difficulty. The objection was not waived by Patrick Creighton appearing and pleading on the merits.[2] In Boyd v. Lang[3], relied on by the respondent, no objection had been taken to the competency of the decerniture against Boyd, who had appeared as in right of another, and joined issue with Lang in the action, and did not even in his additional pleas in law, or until the advising in the Inner House, take the objection.

3. Farther, in respect of the principal debtor not being duly cited, the original as well as supplementary actions were inept, through the want of jurisdiction in the sheriff, the Court of Session being the only competent forum.[4] The act of sederunt, 14th December 1805, referred to by the respondent, only applied where a doubt existed as to the residence, and had reference to the then existing bankrupt act, which has expired, and so has the act of sederunt. Here the fact of Rankin junior being furth of the kingdom was notorious, and required not to be proved.

4. The obligation of the cautioners, under the bond of caution of August 1827, did not attach to the claim sought to be made effectual, because the cautioners were liberated from that obligation by the acts and omissions

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[1] M'Indoe v. Lyon, 7th Dec. 1826, 5 S. & D. 94; Lyle v. Balfour, 17th Nov. 1830, 9 S. & D. 22; Stewart v. Gloag, M'Le. & Rob. 738.

[2] Wedderburn v. Town of Dundee, 4th Jan. 1740, Mor. 11986.

[3] 20th Jan. 1832, 10 S., D., & B., 213.

[4] Burn v. Purvis, 13th Dec. 1828, 7 S. & D. 194.

of the trustees,—1. In respect the trustees so conducted themselves as to alter the condition and risk of the cautioners, as stipulated, or provided for, or contemplated, when the bond of caution was granted; 2. In respect the trustees violated or failed to observe the duties and obligations incumbent upon them by the road acts, and which formed conditions precedent to the enforcement of the cautionary obligation; 3. In respect the trustees not only suffered the treasurer to act in opposition to the rules and regulations of his office, but connived with and encouraged him in their violation, and otherways conducted themselves towards him with gross negligence.[1] It has been said that the dealings of the treasurer with another road, viz. the Monkredding road, have been kept out of view; but the balances in the treasurer's favour on the Monkredding road cannot relevantly be blended or taken into computation with the account of the Lochlibo road in the present question; the Monkredding road was under the management of the Lochlibo district trustees when they took the bond, and it cannot be held to be one of the "roads which may be put under the management of "the committee." The respondent admits the accuracy of the appellant's statement of the balances, and so the extent of the loss incurred through their negligence is beyond dispute. This was a cautionary obligation for the due performance of an office, and not for the payment of a specific sum. The committee of trustees had certain statutory duties to attend

[1] Dict. per V. C., Eyre v. Bartrop, 3 Mad. 221; per C. B. Richards, in Bowmaker v. Moore, 7 Price, 231; per Lord Ellenborough, C. J., in Bacon v. Chesney, 1 Stark. N. P. C. 192. Dick v. Nisbet, 30th Nov. 1697, 1 Fount. 798, Mor. 2090; University of Glasgow v. E. of Selkirk, 18th Nov. 1790, Mor. 2104; Straton v. Rastall, 2 T. R. 370.

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to and enforce, through the neglect and non-enforcement of which the loss accrued on the Lochlibo road accounts. In obligations like the present it is the duty of the principal to "superintend and watch over the conduct of "the principal debtor in a proper and rational man-"ner."[1] The correct doctrine, with reference to the cases on both sides, is, that if there has been nothing more than a mere omission or delay the sureties are liable; but if there has been a positive act whereby the risk of the sureties has been increased, then they are not liable. On principle, independently of specialties, the case of M'Taggart in the House of Lords does not derogate from the authority of prior cases.[2]

Appellant's Argument.

Respondent's Argument.

Respondent.—1. The action was brought by the respondent as representing the committee of trustees. Those district trustees could in their own name have sued, being the creditors in the bond. Hence they can authorize a third party to sue in their name, as in Low's case (supra, p. 117.), where a committee was held to have been duly authorized by district trustees, and the authority of which case was recognized by the Lord Justice Clerk (Boyle) in the subsequent case of Oswald. [LORD CHANCELLOR.—Rankin sues in his

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[1] Per Lord Balgray, in Forbes, 10th June 1829, 7 S. & D. 732; Bell's Princ. s. 287. and 288; Fell on Guarantee, 157; Duncan v. Porterfield, 12th Dec. 1826, 5 S. & D. 102; Mein v. Hardie, 19th Jan. 1830, 8 S., D., & B., 346; Smith v. Bank of Scotland, 1 Dow. 296; Thomson v. Bank of Scotland, 11th June 1824, 2 Sh. App. 316; Linlithgow Commissioners of Supply v. Menzies, 10th Feb. 1831, 9 S., D., N., & B., 434; Thistle Friendly Society of Aberdeen v. Garden and Knox, 17th June 1834, 12 S., D., & B., 745; Pringle v. Tate, 10th July 1834, 12 S. & D. 918; Montague v. Tidcombe, 2 Vern. 518; Fell on Guarantee, 180.

[2] M'Taggart v. Watson, 16th April 1835, 1 Sh. & M'L. 566.

own name, not in the name of the trustees.] So did the committee in Low's case. [LORD CHANCELLOR.—In Low's case the pursuers were some of the proper parties; the objection was that all the proper parties, pursuers, were not in the field.] But in Low's case the pursuers were held entitled to sue as persons authorized by the trustees to sue. Here, the clerk founds upon the express authority to bring the action as good authority at common law, as holding delegated power from trustees entitled to pursue, and assigning to another their full right to do so. [LORD CHANCELLOR.—Can it be stated as a general principle of law that a party appointed officially with statutory powers can delegate his power to sue; the assignment of all right and interest in a party to another is different; but can a party alone entitled to sue delegate his statutory powers to another?] With reference to the sections of the acts quoted, if the general and local acts authorize the trustees to divide themselves into district committees, and if district committees have power to appoint clerks and treasurers, the district trustees must have the benefit of the 16th section, to the effect of enabling their clerk to sue. District trustees have, by those statutes, the widest powers of the general body of trustees given to them. A question may, no doubt, arise as to the extent of the power given in any particular case to any clerk or officer appointed by district trustees; and so in Williamson v. Goldie (supra, p. 111.) it may have been that the district clerk had not authority to bring the action, and therefore it would seem not to apply; and even if it did, it cannot be held a good decision, and the Lord Ordinary thinks that it

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was decided on the circumstances.[1] [LORD CHANCELLOR.—That case certainly pressed harder on the judges in the Court of Session than it can do on this House.]

2. The omission of Patrick Creighton's name, per incuriam, in the conclusion of the summons, in which he is previously mentioned throughout, is in itself no objection, and at all events was cured by the supplementary action. In any view Patrick Creighton's citation and appearance, and pleading to the action, answers the objection; and for the same reason his acquiescence till after decree bars him from stating it.[2]

This was the view sanctioned in the recent decision of Boyd v. Lang.[3] In course of certain proceedings in the inferior court, a party sisted himself as defender, and litigated the case on its merits with the pursuer till judgment was pronounced against him. The cause was then advocated; and the only difference between it and the present case was, that the objection of the original libel having no conclusions against him was not stated in the note of additional pleas upon which the case was argued in the Outer House, but was argued only at the bar of the Inner House. This, however, does not at all affect the principle of the decision, and the competency of holding a party to have waived the form of executing

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[1] Cases of Low and Oswald, ut sup., p. 117; Mackenzie v. Walker, 25th June 1831, 9 S., D., & B., 801; Bauchope v. Cox, 6 Dec. 1832, 11 S., D., & B., 175; Rocheid's Trustees v. Balfour, 19th Dec. 1834, 13 S., D., & B., 220; Barclay's Law of the Road, p. 57; Bow, 6th Dec. 1824, 4 S. & D. 276.

[2] Hallyburton v. Blairs, 1 June 1836, 14 D., B., & M., 859; Elliot v. Johnston's Trustees, 1 S. & B., 54 & 218, and 2 Sh. Ap. 461.

[3] 20th Jan. 1832, 10 S., D., & B., 213.

the summons against him so as to justify a decerniture by which he shall be bound.

The earlier case of Wedderburn[1], to which the appellant refers, was peculiar, inasmuch as the party there had merely sisted himself specially for his interest, and only to see that the question of astriction in which he was interested was fairly argued with the party properly called and appearing as the defender in the cause. A compearance merely for his interest was held not to justify a personal decerniture. This is entirely different from such a case as the present, where the advocator's appearance as a defender led to the whole litigation which ensued, there being defences lodged for no other party but himself, and where there could be no other issue to that litigation but a personal decerniture against him, or decree absolvitor. Moreover this case of Wedderburn was under the view of the Court when they decided the more recent case of Boyd.

3. A party is not considered furth of the kingdom until after forty days from the time of his leaving his domicile.[2]

4. Taking the accounts of the two roads of the district to which the management of the treasurer applied, and having reference to the sums in the bank account, (the bank account being kept in the treasurer's name, and not in that of the trustees,) the fact is unquestionable, that in 1828, 1829, and 1830, in place of there being large balances in the treasurer's hands, as represented by the appellant, a balance was due to him by the road trust. At the audit in the year 1831 there appears indeed to have remained with the treasurer 183*l.* 13*s.* 4½*d.*,

[1] 4th Jan. 1740, Mor. 11986.

[2] Act of Sederunt, 4th Dec. 1805; Ersk. b. i. t. 2. s. 16. note.

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but this sum was speedily exhausted in payments on account of the roads; and at the last audit in 1832, as has been stated, the sum of 77*l.* 8*s.* 11*d.* remained with the treasurer. So far, in regard to those two years, there was, at the time of the audits, more money in the hands of the treasurer than there ought to have been, had he faithfully complied with his obligation to lodge the sums in his hands in the bank accounts. But beyond this the state of the facts does not admit of the plea on the ground of negligence, raised by the cautioners, being maintained. There are two capital errors committed by the appellant in all the views given by him of the accounts; the one lies in leaving out of sight the intromissions of the treasurer with the funds of the Monkredding road, and the other, in stating the gross balances appearing in the road accounts, without deducting the sums which were at the moment deposited in the bank, as provided by the bond of caution. Effect being given to those two errors, the statements of the appellant are at once reconcileable with the truth, and with the view of the accounts the respondent has just given.

The ground of objection, as regards its merits, is difficult to be discovered; for it has never been held, either in Scotland or in England, that where a treasurer for road trustees enters into a bond with sureties, and absconds with a balance in hand, it is any answer to an action against the cautioners, that a balance was, through neglect of the trustees, left in the party's hands. Even if there had been neglect in the present instance it would not have been sufficient to relieve the cautioners. The principle is, that there must be fraud, or giving time, or so conducting matters with the debtor as to disarm the

cautioner, and thus entitle him to be relieved. Such is the settled rule in England, in the Trent Navigation Company v. Harley[1], Eyre v. Everett[2], and London Assurance Company v. Buckle.[3]

Respondent's Argument.

While there is a duty on the part of the trustees, there is an equal obligation on the part of the officer to pay, and the sureties are obtained for the purpose, among others, of seeing that the money is paid over. The cases of Duncan and of Mein (supra, p. 120.) lay down extraordinary rules, which have been corrected by a judgment of the House of Lords, temp. Lord Brougham, Chancellor, in M'Taggart v. Watson[4], which, with the cases of Smith and of Thomson, was decided on correct principles.[5]

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, the pursuer in this case is described in the summons as "clerk of the "committee of trustees of the Lochlibo district," and "as representing the said committee, and duly and "specially authorized by a general meeting thereof." If, therefore, the pursuer can maintain his title to pursue in either character, the first preliminary objection must fail. Lord Jeffery, the Lord Ordinary, was inclined to support the pursuer's title upon both grounds. I do not understand the other judges to have expressed any opinion upon the first ground, viz. the title to pursue under the statute. This is to be regretted, as both points are of considerable importance, and of general application.

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[1] 10 East, 34. [2] 2 Russ. 381. [3] 4 Moore, 153. [4] 1 Sh. & M'L. 566.

[5] See also Hamilton v. Calder, 18th June 1706, Mor. 2091; Wallace v. Sanders, 20th Feb. 1708, Mor. 2096; Eadie v. How., 3d Feb. 1829, 7 S. & D. 356.

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Ld. Chancellor's Speech.

I have thought it my duty to look into the general road act, for the purpose of forming my opinion. The 9th section authorizes trustees acting under any general turnpike act to divide the road comprised in any turnpike act into districts, and to name committees of their number for the more immediate direction and management of such road or any particular parts thereof, and the regulations above enacted are to apply to and affect all such committees. The 11th section of 4 Geo. 4. c. 49. gives to the trustees in their district or committee meetings full power to appoint clerks and collectors, and treasurers, with salaries; but the 1 & 2 W. 4. c. 43. s. 10. gives the power to trustees acting under any turnpike act, in which the district committees clearly are included. The 11th section of the last-mentioned act directs the trustees of every turnpike road to take security from every treasurer to be appointed by them. By the 10th section the district trustees were to appoint a treasurer. The security directed by the 11th section must be by the treasurer so to be appointed, and to be given to the district trustees who are so to appoint him. The 13th, 14th, and 15th sections contain regulations for the conduct of the trustees, in which they are described as trustees of every turnpike road; and the 16th, using the same description, enacts that the trustees of every turnpike road may sue or be sued in the names of their clerk or treasurer, and provides that his costs shall be paid out of the trust funds of the road for which he shall act. The 17th section provides, that all such officers as shall be appointed by any trustees of any turnpike road shall account with them, and in default the sheriff is to act on the application of the said trustees; and by the 18th section the trustees of every turnpike road are, by them-

selves or some committee of their number, annually to examine, settle, and audit the accounts, and make an abstract of them.

The result of those several provisions appears to me to be, that when the road under any turnpike act is divided into districts, and a part assigned to a committee of the trustees, that committee are the trustees for the purposes of that part of the road so assigned, and as such have all the powers and authorities given by the act, though subject to the direction and control of the general body; and that they have the power of appointing the clerk and treasurer of such road; that they are to take security from such clerk and treasurer; and that the clerk so appointed is under the 16th section, when necessary, the proper person to sue, upon the security so given by the treasurer to such committee of trustees.

I certainly am not able to reconcile the expressions, attributed to some of the judges in Williamson v. Goldie (ante, p. 116), with this construction of the statute. That case was not brought to this House, and Lord Jeffery thinks, that from the circumstances of that case, it is not necessarily a decision adverse to this construction. Be that as it may, it cannot in this House operate against our adopting a construction of the statute which appears to be the correct one, and which is necessary for the due operation of its several provisions. The particular road or part of a road being assigned to a committee, they are to appoint the officer for such road, or part of a road; they are to take security, and to audit his accounts; and they to whom the security is given are, by their clerk so appointed by them, to enforce against the security the payment of the balance so

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found due from the treasurer appointed by them, upon the examination and audit of his accounts.

If this be the right construction of the statute, the pursuer's title to sue is established, without the necessity of considering the other ground, upon which it appears to have been principally supported by the judges of the Inner House. I certainly feel relieved by not being under the necessity of expressing any conclusive opinion upon this subject, a question purely of practice which has been thought free from difficulty below, and as to which from that cause probably we are without any reasons given for that opinion. Upon a question of practice, the rule of the Scotch courts constituting as it does the law of Scotland must prevail, and upon such a subject your Lordships would be most unwilling to disturb a deliberate judgment of the Court of Session. If any case should come before this House calling for a decision upon that point, your Lordships will be anxious to be informed more fully as to the practice of the courts of Scotland upon the subject, and as to the grounds upon which any decision upon it may be founded. No such practice exists in this country, and if, by the law of Scotland, a party having himself a right to sue can, by such directions as were given in this case, enable another to maintain a suit in his own name, it will be necessary to consider many consequences which may flow from such a rule. In that case, the usual provision in acts of parliament that companies or other bodies may sue by their officer will be unnecessary in Scotland; and if the power exists only to enable a company to authorize a person to maintain a suit, and does not render the company liable to be sued in the name of the same person, it would appear that consequences

may follow which are not consistent with obvious principles of justice. Here I must be understood as speaking of transactions which do not amount to assignments of the subject matter of the suit, but which leave the property in such subject matter, and therefore the fruits of the suit, in the party giving the authority to sue. These and many other considerations will, no doubt, receive all due examination by the Court of Session in any case in which a similar question may be raised.

I will only further observe, that the 109th section does not aid the proposition contended for, because if that section enables any person authorized by the trustees to sue for the penalties, that authority is conferred by the statute, whereas the argument in this case assumes a right of delegating the power to sue independently of any statutable provision.

As to the objection that Creighton was not named in the conclusion to the summons, I cannot but express my satisfaction that the learned judges of the Court of Session have not found any thing in the practice of that Court to compel them to give effect to such an objection. The summons does not in its conclusions name Patrick Creighton, but it states that Rankin, the principal, and Creighton and others, as cautioners, had been applied to for payment, and had refused, unless compelled; and then omitting the name of Patrick Creighton, but stating the name of the principal and of the other cautioners, concludes "that the said prin-"cipal and cautioners foresaid" might be decreed to pay. To this summons Patrick Creighton appeared, and put in defences, but did not raise this objection. After his death, his representative, the present appellant, sisted himself as a defender in this process in his place,

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but did not raise this objection, and the suit proceeding against him without this objection being made in the sheriff court, a decree for payment was pronounced against him. It would have been much to be regretted if, under such circumstances, the whole proceedings could have been set aside by the mere omission of the name of Patrick Creighton in the conclusion of the summons.

In Capel v. Buller[1] the Vice Chancellor (Sir John Leach), refused to permit a party who had appeared at the hearing, and consented to be bound by the decree, afterwards to object that he had never been served with process, or appeared to the suit.

As to the objection that the principal debtor had never been properly made a party to the suit in the sheriff court, the service of process having been at his dwelling house, which was within the county, but which service it was contended was not regular, he having left the county some time before,—the summons states that on the——day of June 1833, he left the country without having rendered his accounts, and the action it appears was commenced on the 6th July 1833. This statement does not necessarily show that there was any irregularity in the proceedings as against him, or that he was not properly subject to the jurisdiction of the sheriff, and there does not appear to have been any proof of the facts upon which this objection is founded. This point does not appear to have been adverted to by any of the judges, and your Lordships have no means of knowing, whether they thought the act of sederunt of 14th December 1805 applicable to it or not; in

[1] 2 Sim. & St. 462.

the state of the facts as they appeared on record it seems to me to be impossible to give effect to this objection.

The case then remains to be considered upon its merits. The appellant is sued as the representative of Patrick Creighton, who became bound to the committee of trustees of the Lochlibo road as security for Robert Rankin junior, who had been appointed by them treasurer of that road, and that he would faithfully execute his office, and from time to time and as often as required account for and make payment to the road trustees of his intromissions with the funds of the road, and of all monies that should be paid to him as such treasurer. It was also provided that all monies to be received by the treasurer should be lodged in the bank in his name, and that he should at no time keep in his hands more than 20*l.* to answer contingencies.

The conduct of the trustees, the parties assured, is made the ground on which the liability of the security is rested. And as a most learned and distinguished judge, Lord Jeffery, has expressed an opinion, although accompanied with much doubt, that the cautioners had thereby been discharged, and as it is of much importance that the rule of law in Scotland upon this subject should not remain in doubt, I think it right to go into some consideration of the subject, although the four judges of the Second Division agreed in opinion that the security was not discharged, — in which I entirely concur.

The ground upon which Lord Jeffery thought that the cautioner was discharged, was that the trustees had neglected at the annual audit to require actual payment of part of the balance in the treasurer's hands, and to

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direct the application of such part of the balance, being of opinion that there was no impropriety in there being in his hands part of such balances to meet the current expenses, and therefore thought that the cautioner might upon that ground be relieved, notwithstanding the decision in the case of M'Taggart.[1] In that case the defence was that the commissioners had neglected the duty prescribed by the statute, in not calling the trustees to account from 1826 to 1829, and upon that ground the Court of Session thought the cautioner relieved; but when the case came to this House, the learned Lord (Brougham), who advised the House, observed truly, that many dangerous doctrines upon suretyship obligations appeared to be suggested in some of the cases in Scotland; the interlocutors appealed from were reversed, and the sureties were declared to be liable. That case is of the highest importance, as it removes the authority of some early cases in Scotland, which are not consistent with it, and makes the rule applicable to such cases the same in Scotland as in England. Indeed, it has not been contended at the bar that the rule in the two countries is different.

Upon the rule in England there is no doubt. It is familiar to every lawyer, and I am glad to be able to expound it in the terms which a judge of the highest authority (Lord Eldon) has laid it down, and which I think entirely correct. In the case of Samuell v. Howarth[2] Lord Eldon says, "the rule is this, that if a "creditor, without the consent of the surety, give time "to the principal debtor, by so doing he discharges the "surety, that is, if time be given by virtue of positive

[1] 1 Sh. & M'L. 553. [2] 3 Meriv. 278.

"contract between the creditor and principal, not "where the creditor is merely inactive; and in the "case put, the surety is held to be discharged for the "reason, because the creditor by so giving time to the "principal has put it out of the power of the surety to "consider whether he will have recourse to his remedy "against the principal or not; because he in fact can- "not have the same remedy against the principal as he "would have had under the original contract.

In Eyre v. Everett[1], a delay of five years, during which the obligee had not sued the principal, was urged as an exoneration of the surety, but the same learned judge held the surety liable; and this rule of law is so well understood in this country, and so well explained by Lord Eldon, that it is not necessary to enter into an investigation of any other cases.

What then are the facts of this case, with reference to this rule? The accounts were regularly examined and audited, and it may be assumed that it was the duty of the trustees not to leave more money in the hands of the treasurer than might be necessary for the current expenses of the road; and that in fact more was left in his hands than was necessary for that purpose; but there is no evidence of any alteration in the terms of the contract to which the surety was a party,—nothing that could have precluded the trustees from requiring payment of the balance found due. There was therefore nothing more than an omission to require payment; and although this might be a neglect of the duty imposed upon the trustees by the act, it does not for that reason operate more strongly in favour of

[1] 2 Russ. 384.

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the surety, than a similar neglect of the course of proceeding, which the cautioner might, from the usual course of business, or the routine of trade, or the nature of the transaction, have been led to expect would take place. Such neglect can only be urged in his favour, as placing him in a different situation and exposing him to greater risk than he had intended; and this effect is produced by every omission in keeping the principal punctual to his payments; but such omission cannot be pleaded as an exoneration of the surety.

It was truly said that the trustees had improperly sanctioned the treasurer's applying the balances in his hands for the Lochlibo road to defray the expenses of the Monkredding road; and this I think appears to be the case, for I cannot think that the Monkredding road can be considered as included in this bond; but that does not appear to me to be material as the facts arise in this case. If indeed the attempt had been to make the surety repay balances from the Lochlibo trust, which the treasurer had, with the consent of the trustees, applied in repaying to himself balances due to him upon the Monkredding road; a question would arise, whether such application of the Lochlibo balances was not equivalent to payment to the trustees, for the purpose of relieving the sureties from a claim to so much of the balances as were so applied; but no such case arises. The appellant (see his revised case, p. 22), states the annual balances of the Lochlibo trust, and brings out 367*l.* 6*s.* 8*d.* as the ultimate balance on 4th June 1833, and (same page) the effect is shown of including the Monkredding account, which does not materially affect the balance, as indeed it could not,—the balance due to

him on the Monkredding road in June 1833 being only 10*l.* 15*s.* 2½*d.*; and the appellant's minute (p. 29), shows that the appellant has not, in the sum he has been decreed to pay on account of the Lochlibo trust, been prejudiced by the manner in which that account has been blended with the account of the Monkredding road. It would indeed from that minute appear, that a small part of the sum the surety has been decreed to pay consists of a balance due from the treasurer in respect of Monkredding road to 26th of May 1833; but in page 22, he states 10*l.* 15*s.* 5½*d.* to have been due to the treasurer on that account on 4th June 1833. I have not been able to reconcile these two statements, but the difference if any must be very small, and no case is made for the appellant upon any such error in the account. I am, however, satisfied that the interlocutors appealed from are correct. I would therefore move your Lordships, that they be affirmed with costs, for although the Lord Ordinary threw out an opinion upon the case, he came to no judgment upon it, but made avizandum to the Second Division, and the judgment of the Inner House was unanimous.

In the other appeal[1] with respect to the Irvine trust the circumstances do not appear materially to differ from those of the present. I therefore move your Lordships, that the interlocutor in that case also be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the said interlocutors therein complained of

[1] There was another appeal betwixt the same parties, involving similar points, and heard at the same time.

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be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

MACDOUGAL and UPTON—DEANS and DUNLOP, Solicitors.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1840.

[21*st July* 1840.]

ROBERT WILSON, Appellant.[1] (No. 7.)

[*Lord Advocate* (*Rutherfurd*) — *Pemberton.*]

JAMES TAIT and others, Moffat's Trustees, Respondents.

[*Attorney General* (*Campbell*) — *James Anderson.*]

Prescription (*Septennial*) — *Stat.* 1695, *c.* 5. — A sum of money was lent upon a bond and disposition in security, and by a letter of the same date another party, after stating that such bond had been granted in security of the money lent, "guaranteed" to the parties advancing the money "the payment of the sum contained in the bond, "whenever the same shall be demanded in terms of the "stipulations of the said bond, and that in addition to "the personal and heritable security contained in the said "bond," he being entitled to an assignation at his own expense when required: the bond and disposition in security made no mention of the letter, and contained no clause of relief. The party granting the letter having pleaded the septennial prescription in defence to an action

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[1] 15 D., B., & M., 221; Fac. Coll., 8th Dec. 1836.

for the money lent by the creditors in the said bond,— Held (affirming the judgment of the Court of Session), that he was not entitled to the benefit of the act.

Caution — Guarantee. — The term "guarantee" is not equivalent to "caution." (Per L. C. p. 150.)

1st Division.

Lord Ordinary Fullerton.

Statement.

ON 20th October 1826 the trustees and managers of the Brighton Street Relief Chapel in Portobello granted a bond and disposition of the chapel in security of 2,000*l.*, in favour of William Moffat, apothecary, Edinburgh, in liferent, and Miss Moffat, afterwards Mrs. Tait, in fee. The appellant, Mr. Robert Wilson, writer in Edinburgh, the law agent of the chapel trustees, granted, on the same day, the following obligatory letter, addressed to Moffat: "Sir,—The trustees and managers of the "Brighton Street Relief Chapel having granted a bond "and disposition in security for 2,000*l.* sterling to you "in liferent, and Miss Moffat and her heirs and as- "signees in fee, dated this day, over the church and "other ground feued by them in Brighton Street, I "hereby guarantee to you and the said Miss Moffat, and "her foresaids, payment of the foresaid sum of 2,000*l.* "sterling, interest, penalties, and expenses, contained "in the said bond and disposition in security, whenever "the same shall be demanded, in terms of the stipu- "lations of the said bond and disposition in security, "and that in addition to the personal and heritable "security contained in the said deed, I being entitled "to an assignation at my expense when required. In "witness whereof," &c. It appeared from the written evidence in process that the lenders would not proceed with the loan without such letter from the appellant.

Moffat having afterwards agreed to restrict the security to a portion only of the subjects covered by it, Wil-

son, on 20th December 1831, addressed a letter to Mrs. Tait and him, in which, after narrating the bond and disposition, he described his own obligatory letter as "a collateral obligation in your and Mrs. Tait's favour "for payment of the whole sums contained in said "bond," &c.; and consented that the restriction of the security should not prejudice their right "to enforce "the foresaid collateral obligation against me."

In 1834, Moffat being dead, his trustees and Mrs. Tait, as in right of the bond and relative obligatory letter, raised an action against Wilson for payment of the sum in the bond and interest.

The appellant pleaded in defence, that the letter was merely cautionary, and had been avoided by the septennial prescription; and separately, that he was released from his obligation by the respondents improperly neglecting to take steps against some of the principal obligants, from whom the greater part of the loan might have been recovered.

The Lord Ordinary (17th March 1836) pronounced the following interlocutor, with a note annexed:—"The "Lord Ordinary having heard parties procurators, and "considered the closed record and process, repels the "defences, and decerns against the defender, in terms "of the conclusions of the libel; finds the defender "liable in expenses, and allows an account thereof to "be given in, and to be taxed by the auditor.

"*Note.*—It has been repeatedly decided, that obliga- "tions of the nature of that sought to be made good in "the present action do not fall under the act 1695, "c. 5. The very specialty mainly rested on here, viz. "that the obligation is of the same date as the original "obligation to which it refers, and which it is intended

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" to corroborate, occurred in the case of Howison v. " Howison, 8th Dec. 1784[1], and was disregarded.

" 2d. It does not appear to the Lord Ordinary that " the obligation is properly cautionary, and of such a " kind as to warrant the defender's demand, that the " obligants in the original bond shall be previously dis- " cussed. As between these obligants and the defender, " the latter may substantially be a cautioner; but he is " not bound merely as such by the missive libelled. " By that document he binds himself to guarantee the " ' payment of the foresaid sum,' and ' whenever the " ' same shall be demanded,' and ' that in addition to " ' the personal and heritable security contained in the " ' said deed.' This is not a cautionary, but a collateral " and corroborative, obligation, contracted directly to " the pursuer's author, which places the defender in the " situation of a co-obligant with those bound in the " original bond. In support of this, as the understood " nature of the defender's liability, it may be observed, " that in the defender's deed of the 20th of December " 1831, agreeing to the restriction of the heritable se- " curity, he expressly describes the missive libelled as " importing not a cautionary, but a collateral, obli- " gation.

" 3d. It does not appear to the Lord Ordinary that " the circumstances which took place, respecting the " attempted sale of the heritable property, afford the " defender the slightest ground for getting rid of his " liability."

The appellant having reclaimed to the Lords of the First Division, the following judgment was pronounced

[1] Mor. 11030.

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by their Lordships:—"The Lords having advised this "reclaiming note, and heard counsel for the parties, "recall the interlocutor reclaimed against, in so far as "it decerns for the full sum of interest on the principal "debt, and finds the defender liable in expenses: Quoad "ultra adhere to the said interlocutor, and refuse the "desire of the reclaiming note, and decern in terms of "the libel, under deduction of ten pounds from each "year's interest of the principal sum during the town's "occupation of the Brighton Street Chapel, in virtue "of the lease referred to in Mr. Meikle's letter of "24th August 1835, and find no expenses due to the "pursuers by the defender." The opinions of the Judges are subjoined.[1]

[1] *Lord Balgray.*—"I think it clear that the act does not apply to "a cause of this description. The letter written by Wilson himself, on "20th December 1831, expressly describes the letter in question as 'a "'collateral obligation.' He was a professional man, and that shows "his own understanding of the nature of his obligation all along. I "look upon it as a collateral and corroborative obligation, to which the "statute does not reach.

Lord President.—"I take the same view, and I am also influenced in "doing so by the terms of the letter which has been just referred to. "The obligatory letter of 20th October 1826, was plainly granted after "the date of the bond, as it bears in gremio to be given in respect of "the bond having been granted; and although it were but a few minutes "which elapsed between the granting of the bond and the granting of "the defender's obligatory letter, that is enough to exclude the operation "of the statute. It may create a case of great hardship to parties, and "in this instance I think it has done so; but, in point of principle, it is "quite immaterial how long or how short is the interval between exe- "cuting the principal obligation and the collateral obligation. If parties "will execute their contracts according to such a form as to be without "the reach of the statute, they cannot afterwards ask the benefit of the "statute from the Court.

Lord Gillies.—"This is a very narrow case indeed, but I am not pre- "pared to alter the interlocutor. If the obligatory letter which refers "to the bond had itself been referred to in gremio of the bond, I think "the statute must have applied to the case. On the other hand, if the "obligatory letter had been dated but one day after the bond, it is clear "that the statute could not have reached it. Between these narrow

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Appellant's Argument.

Mr. Wilson appealed.

Appellant.—The creditor in the bond was aware that the appellant was only a surety, as the letter founded

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" limits the point comes to be, whether the obligatory letter, dated on " the same day with the bond' and referring to it, and being beyond " doubt pars ejusdem negotii, is within the reach of the statute, or not. " In the case of Howison, the cautioner's obligation was granted on the " same day with that of the principal, and I think it clear enough that " the collateral obligation in that case was treated just as a cautionary " obligation, and nothing else; and also as being pars ejusdem negotii. " That is, therefore, a direct precedent on this important feature in the " present case; and I observe, from the tenor of the defender's letter, that " it narrates the bond and disposition to have been already granted, and " states this as the cause why the defender executes the obligatory letter; " so that the principal obligation was, in point of fact, first executed. It " is true, that at least a whole day did not intervene between them, but " some interval there must have been; and the lapse of a day or part of " a day is often decisive either in such a question as this or in other " questions in human affairs. In less than one day the battle of Phar- " salia was fought and won, and Pompey, who in the morning was lord " of a large portion of the globe, was before night a fugitive and a wan- " derer on the face of the earth. In the present instance, I think the " interlocutor of the Lord Ordinary should be affirmed.

Lord Mackenzie.—" This is certainly a case which is narrow in the " extreme, and even more so, I apprehend, than has just been stated by " my Lord Gillies. Besides the clear evidence that the obligatory letter " was pars ejusdem negotii with the granting of the bond, to which bond " the letter refers, it will be observed, that by the averments of the pur- " suers themselves they positively say on the record that they declined to " lend the money until it was agreed by Wilson to grant the obligatory " letter in question. That is clearly a letter of express ' guarantee' or " caution, which of course I consider to be equivalent terms; and it is " evident, on looking to the circumstances and to this statement on the " record, that the granting of this cautionary letter was part of the " original contract. As I hold it certain, therefore, that the granting of " this letter was from the first part and parcel of the contract for this " loan of money, and as the letter bears the same date with the bond, " the question comes to be whether it is not equally within the intention " and the enactment of the statute? It may be that the letter in point " of time was signed at a later period of the day than the bond; but in " the whole circumstances, and considering the statement of the pursuers " themselves, I cannot see how this should affect the decision. It re- " mains equally true, that the letter was just a part of the original con- " tract for the loan; the bond and the letter were parts of one and the " same contract. The question therefore comes to be narrowed to this

on stipulates for an assignment of the bond in the event of the cautioner being compelled to pay. Such a stipulation implies, that if payment should be made by the appellant, the debt would not be thereby extinguished, but would only be transferred to a party entitled to relief, as being cautioner for the principal borrowers and debtors. The granting of the cautionary obligation by the appellant formed a part of the contract in virtue of which the loan was made, whereby

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" fine point, whether the statute, which would undoubtedly have reached " Wilson's share in this contract, supposing it to have been embodied in " one and the same deed with the principal bond, is prevented from " reaching it by the circumstance that the contract is expressed in two " deeds, in place of one. The letter refers to the bond, and if a counter " reference in the bond back to the letter be essential, it is difficult to " see how this is not supplied to all intents by the statements of the " pursuers themselves on record, who are in right of the bond. No " words, which could have been inserted in the bond, could more clearly " have made it refer to the letter, than it is proved by that statement to " have had reference to the letter when executed, and when the loan was " finally assented to and completed. I feel very great difficulty in dis- " posing of this question in a satisfactory manner. In the case of " Howison, the cautionary obligation was not expressly of a cautionary " nature, however clearly it may have been understood by all parties to " be so; and that circumstance is a specialty which to a certain degree " renders that case weaker than the present in claiming the protection of " the statute. Still that obligation was of the same date with the prin- " cipal obligation, and was clearly pars ejusdem negotii; and I rather " think it must be regarded as a precedent to this extent, that parties " may evade the statute by merely adopting two separate writings, in " place of inserting the principal and the cautionary obligation in one. " But I feel the point to be so very narrow, in holding that one and the " same contract falls under the statute if executed in one deed, but does " not fall under it if executed by means of two deeds, that, but for the " precedent of Howison, I should have doubted very much whether a " remedial statute should be so restricted in its application. And were " it not for the opinions already expressed to-day, it would be more satis- " factory to my mind to have had more time for consideration before " deciding this case.

Lord Gillies.—" The averments of the pursuer, now referred to " by my Lord Mackenzie, are so far from being founded on by the " defender, that he meets them with a qualified denial." (Rep. in 15 D. B. & M.)

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Appellant's Argument.

the case is brought within the statute even in terminis. There is only one expression in the statute that may seem ambiguous, viz., that the cautioner ought to have "either a clause of relief in the bond, or a bond of "relief apart intimated personally to the creditor." The meaning of this merely is, that the creditor must be informed or made aware of the true situation of the cautioner; viz. that he is a cautioner, and not a principal in the borrowing. Accordingly, in the case of Ross v. Craigie[1], "two persons being bound conjunctly "and severally in a bond, the one as principal, the "other as cautioner, the cautioner was found to have "the benefit of the septennial prescription, though "there was neither a clause of relief in the bond, nor "a bond of relief intimated to the creditor at receiving "of the bond, which was thought unnecessary, though "mentioned in the act, the defender being bound "expressly as cautioner." And thereafter, in the case of Douglas, Heron, and Co. against Riddock[2], the Court, while it held, "that the sole object of this clause of the "statute was to inform the creditor of the situation of "the obligants, concurred in finding, 'That as, by the "'bond in question, the petitioner's (defender's) father "'was bound expressly as cautioner, there was no "'necessity for a clause of relief in the bond, or a "'separate bond of relief intimated to the creditor, "'in order to entitle the creditor to the benefit of "'the statute 1695.'" In Scott v. Yuille[3], in the House of Lords, it has recently been found that it is not necessary there should be a clause of relief.

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[1] 11th Dec. 1729, Mor. 11014. [2] 20th Nov. 1792, Mor. 11032.
[3] 27th Nov. 1827, Fac. Col. House of Lords, 5 W. & S. 443.

Although the appellant is bound in the obligation as guarantee, he is in fact a cautioner, as there can be no doubt that the word guarantee is used in the exact meaning of and as equivalent to cautioner; and herein lies the distinction between the present and the single case of Howison[1], founded on by the respondents. The specialty in that case was, that there was no express obligation as cautioner. Now, the act 1695, c. 5. requires this to be expressly stated, and does not leave it to be gathered from the nature of the transaction. The obligation in that case was merely a collateral obligation for farther security; and therefore, though it was of the same date with the principal, the Court rightly held that it did not come under the act 1695, c. 5. No doubt, the obligation is not undertaken in the same writing as that which it was intended to corroborate; but that is not required by the statute, which enacts, that "No man binding and engaging for "hereafter for and with another, conjunctly and severally, in any bond or contracts for sums of money, "shall be bound for the said sums for longer than "seven years after the date of the bond." Though it must be admitted, from the latter part of this sentence, which makes the seven years run from the date of the principal bond, that an obligation corroborative thereof, executed the day following the date of the bond, would not come under the statute; yet there has been no decision, that, if executed on the same day, it would not come under its protection, because it was not in the same writing. The words of the statute also in-

[1] Mor. 11030.

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clude contracts for sums of money as well as bonds; and it is hard to say, where a party becomes bound for and with another in a contract for money, the stipulations of which are carried into effect on one and the same day, that he should be excluded from the benefit of the statute because not bound in the same deed, when it cannot be denied that these two deeds are parts of one and the same contract, and parties may bind themselves by two bonds in the same transaction. Now, this security, given on account of the previous communing, is executed of even date with the bond and with the advance of the money. It is thus part and parcel of the original contract; and it must therefore be held to come under the terms of the statute, which does not require that partes ejusdem negotii shall be embraced in the same bond. Even if there had been the interval of a day, or longer, still if both documents were delivered to the creditor on the same day the statute ought to apply; the benefit of the statute ought not to be lost because the transaction is completed by two bonds instead of one. If it appear on the face of the transaction that the party is surety with another in the same transaction, then the act does apply.[1] The case of Caves v. Spence[2] related to a subsequent obligation, and not part of the same transaction. The case of Gordon v. Tyrie[3] related to an obligation five years after the transaction. The words "guarantee," "cautioner," and "surety" are synonimous. The statute refers to the case of cautioners, a term derived from the civil law, and which includes every sort of security.

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[1] Ersk. b. iii. tit. 3. s. 61.

[2] 3d Dec. 1742, Mor. 11021.

[3] 16th Nov. 1748, Mor. 11025.

Cautum intelligitur sive personis sive rebus cautum est.[1] The neglect of the creditor to adopt every means of recovering the debt went to relieve the appellant of his obligation.

Respondents.—In the obligation undertaken by the appellant, he is bound as obligant in the same transaction, and not expressly as cautioner, as required by the act 1695; it is established, that a party cannot plead that he comes by implication under that statute; the case Blair v. Dempster[2] decided that the act 1695 must be strictly interpreted, it being a correctory statute[3]; and it is settled that a party must be bound for and with another in the same bond, in order to come under it.[4] In the case of Howison, in which there was this specialty, that the corroborative obligation was of the same date as the principal, there was no question as to whether the obligant was bound as cautioner, for that was evident on the face of the obligation; but the point decided was, that the obligant, even though bound by a missive of the same date as the principal bond, did not come under the protection of the statute, which requires that he should be bound in the same writing. Applying this test of the meaning of the term cautioner, there is no ground to hold the appellant a cautioner. Guarantee is

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[1] Dig. lib. 50. tit. 16. de verb. sig. b. 188.; Heinnecc. ad Pand. lib. 2. tit. 8. s. 299.

[2] 20th Jan. 1747, Mor. 11025.

[3] Dwarris, passim; Erak. b. iii. tit. 7. s. 22.

[4] Scott v. Rutherford, 9th Feb. 1715, Mor. 11012; Gordon v. Tyrie, ut sup.; Caves v. Spence, ut sup.; and see Kam. Rem. Dec. 54; Hogg v. Holden, 9th July 1765, Mor. 11029.

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Respondents Argument.

distinguishable from cautioner.[1] Being entitled to an assignation by his letter does not show he was cautioner; because co-obligants are always entitled to an assignation.[2] But even if the appellant be a cautioner, he is not so in the sense of the act 1695; for that act does not embrace all cautioners, and does not apply to those who are not bound expressly as cautioners, and who have not a bond or clause of relief. Here the stipulation for an assignation is not equivalent to a clause of relief, which must be granted by the same deed in which the principal is a party, but a stipulation merely for what he is entitled to at common law. Before the act 1695 a cautioner was bound for forty years along with his principal; and the construction is that, unless the cautioner comes up to the letter of the statute, he is not relieved. The terms of the letter of obligation show that the appellant meant himself as an additional obligant. The statute does not reach corroborative securities granted afterwards.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, In considering the question in this case whether the defender, the appellant, is protected by the septennial prescription under the statute of 1695., c. 5., it must be recollected that a surety or cautioner may, and very often is, as between himself and the party to be secured, a principal debtor; he undertaking, not in default of the principal debtor, but in the first instance, and at all events, and without reference to the capacity of the party principally concerned, to pay the sum secured to the creditor.

[1] 1 Bell's Com. 370.

[2] Blackwood, Mor. 3367.

In contracts of this description the liability of such a contracting party is not affected by the creditor knowing that the debt is not the debt of such party, the creditor not having done any thing which may operate as his discharge. Keeping this distinction in mind, the construction of the statute of 1695 seems to be relieved from much of the obscurity which has been supposed to belong to it. It provides a septennial prescription, first, for those who bind and engage for or with another, in any bonds or contracts as express cautioners; secondly, for those who, though cautioners as between the parties contracting to pay, are principals so far as regards the creditor; but in this case the statute does not apply unless there is a clause of relief in the bond itself, which would give the creditor notice of the character in which the party was binding himself, or in a separate bond of relief, of which the creditor has personal intimation at the time of receiving the bond.

If there had not been any decision upon this statute, it does not appear that there should be included within its operation a separate and independent contract, by which a person should bind himself to pay as principal a sum of money also contracted to be paid by another, although such person should not have any thing to do with the original debt, and although the party taking the benefit of the contract should know that such was the fact. The person so binding himself would not be in any respect an express cautioner, nor would he be a co-principal with a clause of relief in the bond itself, or with a bond of relief apart. It may indeed be said, that although he does not answer either of these descriptions, yet, in substance, his situation is that of a co-principal, with his character of cautioner, as

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between himself and the principal debtor, known to the creditor. The obvious answer to that would be, that such a state of things is not provided for by the statute, and that upon principle and authority the statute is to be construed strictly, and its provisions not extended beyond the cases specified.

What then are the facts of this case? The money sought to be recovered by the pursuers, the respondents, was lent upon the security of certain property, and the bond of certain other persons, in which there was no mention of the appellant. By a letter dated on the same day as the other instrument, but stating that the other parties had granted a bond and disposition in security for the money, the appellant guarantees to the parties advancing the money the "payment of the sum con- "tained in the bond and disposition in security, when- "ever the same shall be demanded in terms of the said "bond and disposition in security, and that in addition "to the personal and heritable security contained in "the said bond," he being entitled to an assignation at his expense when required. One of the learned Judges, Lord Mackenzie, observes upon the term "guarantee," and says it is equivalent to "caution."[1] But the term "guarantee," as used in the appellant's letter, clearly does not express an undertaking that others shall perform what they had contracted to do, but amounts to a distinct contract to pay the sum due, and that on demand; and it was not disputed at the bar that the appellant, if liable at all, would be liable in the first instance, and could not insist upon a previous discussion of the other parties.

[1] Supra, p. 142.

There is no doubt, from the nature of the transaction, that the giving of this letter was part of the contract for the loan. But it is equally certain, that in putting a construction upon these instruments, the bond and disposition in security by the parties borrowing the money must be considered as having preceded the letter of the appellant, for so it is expressly stated in the letter.

Here, then, is a separate undertaking for the sum borrowed, with no clause of relief, but a mere stipulation for an assignation by the creditor upon receiving payment. This is not provided for by the terms of the statute, and there is no room for the administration of any equity under the statute.

But although this appears to be the obvious conclusion from the facts of the case, with reference to the provisions of the statute, it must be seen how far the decided cases are consistent with such conclusions. In Scott v. Rutherford [1] one granting a bond of corroboration, though he had relief, was held not to be a cautioner so as to have the benefit of the act. In Caves v. Spence [2], A. having granted a bond to B. for 50*l.*, C. afterwards gave a holograph obligation in these words:— "Whereas B. did, at my desire, lend to A. 50*l.* con- "form to his bond, I hereby oblige me and mine that "A. shall pay the said sum, or else to content and pay "the same myself to B., he giving me an assignation "to the said bond;" and it was held that C. had not the benefit of the act. In Gordon v. Tyrie [3], it was held that a cautioner granting a bond of corroboration

[1] Mor. 11012.
[2] 3d Dec. 1742, Mor. 11021.
[3] 16th Nov. 1748, Mor. 11025.

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could not plead the septennial prescription. In the two last cases the corroborative contract was of a subsequent date; it does not appear whether it was so in Scott v. Rutherford. In the case of Howison[1] three persons had granted a joint bill of the same date; a letter in these terms was written to the person to whom the bill was given: — "Sir, whereas James, John, and "William Young have of this date granted to you a "conjunct bill for the sum of 100*l.* payable one day "after date, therefore for your farther security I hereby "promise that the said sum of 100*l.* and interest due "thereon shall be paid to you or order when de-"manded." It was held that this obligation did not fall within the act.

All these cases, but particularly the last, are directly in point with the present. The Lord Ordinary therefore was justified in saying that it had been repeatedly decided, that obligations of the nature of the present do not fall under the act 1695.

The cases principally relied on by the defender (the appellant) were the cases of Ross v. Craigie[2], Douglas, Heron, and Co. v. Riddock[3], and Scott v. Yuille[4], in this House. But in all these cases the party pleading the statute was a cautioner expressed in the bond; and the only point decided was, that the provision in the statute requiring a clause of relief in the bond, or a bond of relief apart intimated to the creditor, was not necessary in such a case. Those decisions, therefore, are more in favour of the respondents than of the appellant.

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[1] 8th Dec. 1784, Mor. 11030.
[2] 11th Dec. 1729, Mor. 11014.
[3] 20th Nov. 1792, Mor. 11032.
[4] 5 W. & S. 436.

Other cases might be quoted establishing the doctrine contended for by the respondents; and Erskine, in book iii. tit. 4. sec. 23., considers the law to be settled upon several points which appear to govern the present.

The subsequent proceedings, which are relied upon by the appellant as having operated as a release from his obligation, are insufficient for the purpose.

This appeal appears to have no reasonable doubt to support it, and is against an unanimous judgment of the Judges in the First Division of the Court of Session, although not altogether upon the same grounds. I would advise your Lordships to dismiss the appeal, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the respondents the costs incurred in respect of the appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

JAMES HASTIE — JOHNSTON and FARQUHAR, Solicitors.

[*27th July* 1840.]

(No. 8.) Messrs. WALKER, GRANT, and Company, Distillers, Aberlour, Appellants.[1]

[*Lord Advocate* (*Rutherfurd*).]

ALEXANDER GRANT of Aberlour, Respondent.

[*Sir F. Pollock—John Stuart.*]

Tack—Part and Pertinent.—Certain distillery premises were let by articles and condition of tack, and the extent of ground and premises and other pertinents to which the tacksmen had right was made the subject of arbitration. It having been found by the award that the tacksmen were entitled to a definite portion of ground as a stance for a straw-yard as a pertinent to a piggery, and which was "awarded for that purpose accordingly," and that they were also entitled to possession of a certain space of ground as a roadway:—Held (affirming the judgment of the Court of Session), that the landlord was entitled to interdict the erection of any buildings on the two pieces of ground so awarded, and the using the said pieces of ground in any manner different from the purposes for which they were respectively allotted by the said award.

1st DIVISION.

Lord Ordinary Cockburn.

Statement.

THE trustee on the sequestrated estate of James Gordon, late of Aberlour, let the Aberlour distillery premises to the appellants, for seven years from 10th October 1833, conform to articles and conditions of tack, dated the 30th day of October 1833, which thus describe the subjects:—The company to have the use of the following premises, viz. the distillery

[1] 1 D., B., & M. (new series).

house as occupied by Mr. Gordon; the water and water-wheel used for driving the thrashing and malt mill, to be at command for the distillery operations at all times when required, but the proprietor for the time to have right to thrash with the thrashing-mill three times a week, at an hour to be agreed on with the company; also to have the malt-barn, grain-loft above, with steep and cauch; also the use of the kiln, malt store-room, with every thing thereto attached, necessary for carrying on the malting and distillery operation: second, the two vaulted cellars, the bonded warehouse, and carpenter and smithy shop, pigsties, poultry and draff houses.

It was also provided, that if any difference should arise regarding the meaning and intent of these articles, the parties "agree to submit the same to two persons, "to be mutually chosen, whose award shall be final and "binding."

The appellants commenced business as distillers, and soon after the lands of Aberlour were purchased by the respondent, who agreed with the appellants to submit to arbiters, mutually chosen, "the extent of ground and "premises, and other pertinents, to which they (the "appellants) had right in virtue of the said lease," with power to the referees to name an oversman, whose award should be final. The referees differed, and therefore devolved the matters in the submission to the determination of Mr. Cameron.[1]

[1] The chief subject of difference was as to whether the appellants were entitled to a stance for a straw-yard on premises of the respondent adjoining the piggery, and it was determined by an award that they were so entitled, and also to a roadway to the same. The terms of the award will be found set forth in the Lord Ordinary's note, p. 157.

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The appellants subsequently erected on the ground so allowed by the oversman for the above purpose a building chiefly of wood, but partly of stone and bricks and mortar, and which was in part occupied as a dwelling-house; they also placed two wooden sheds on part of the ground allowed for a roadway, fourteen feet wide.

The respondent presented a petition to the sheriff of Banffshire, craving an interdict against the appellants "from erecting any dwelling-house or other houses or "buildings on any part of the foresaid piece of ground "awarded for a stance for a straw-stack, or on any part "of the foresaid space of ground awarded as a road-"way, and from using or occupying the said two pieces "of ground in any manner different from the purposes "for which they were respectively allotted by the said "award."

The sheriff-substitute at first granted the interdict, but after considering a closed record, as advised by the sheriff, recalled that interdict, and dismissed the petition, with expenses, subject to modification.

The respondent advocated to the Court of Session, where the Lord Ordinary, having closed the record upon additional pleas in law, pronounced the following interlocutor, accompanied with the subjoined note:— "(9th June 1838.) The Lord Ordinary having heard "the counsel for the parties, and considered the record, "advocates the cause; recals the interlocutor of the "sheriff of the 1st December 1836; grants the prayer "of the original petition, and decerns in terms thereof: "Finds the advocator entitled to expenses both in this "Court and in the inferior Court, those in the inferior

" Court subject to modification; appoints an account " thereof to be given in, and, when lodged, remits the " same to the auditor to tax and report." [1]

[1] " There are two points here—1st. What was referred? 2d. Whether the award has been fulfilled?

" The chief difference between the parties was, whether the respondents as tenants were entitled to a place for a straw-stack for their piggery, and what they referred was the extent of ground and premises, and other pertinents 'to which we have right in virtue of the lease,' &c. The respondents say, that this only gave the arbiters power to determine the mere superficial extent, and not to specify any particular use to which any portion of this surface was to be applied. The Lord Ordinary cannot agree with this. The extent of a pertinent does not, either in the language of this reference or in ordinary speech or sense, necessarily denote the mere size of the space over which the pertinent reaches. It includes the use as a part of the pertinent. The two are, or at least often are, inseparable. If it were put to an arbiter to define the extent of the pertinents of a property, would he be exceeding his powers if, besides specifying a road of certain dimensions, he were to add, that this road, however, was only to be used by a particular description of passengers, or only at a particular period, or only for a particular purpose.

" Now when this overman comes to that part of the dispute which relates 'to a stance for a straw-stack,' he disposes of it thus:—'I find 'that the proprietor must furnish them (the respondents) with a stance 'for a straw-stack, and as the trustee has already given them, or at 'least allowed them to occupy, such a stance close to the piggery, I find 'that they are entitled to retain such as a pertinent; and the parties 'have agreed that the space from the south end of the piggery to the 'dyke, being about thirty-three paces, is sufficient, with breadth of 'half that length, which I award for that purpose.' The Lord Ordinary thinks, that in settling the extent of the pertinent under the lease, he was fully entitled, not only to give this piece of ground, but to prescribe the exact use to which it was to be applied, and he does so by limiting its application to keeping straw.

" If this was within his province, and if this be his meaning, it is admitted by the respondents that they have not adhered to the award. They have erected or were erecting a dwelling-house on this ground; and they insist that they are entitled to do so. The Lord Ordinary thinks that they are not. The landlord avers that this is hurtful to him, in reference to an intended mansion-house. This is denied, and it is not proved. The Lord Ordinary has not thought it necessary to allow any proof, because, assuming it not to be injurious in this way, he thinks that the landlord is entitled to prevent the space from being used otherwise than in the limited way for which the oversman gave

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The appellants reclaimed, but the Court (20th November 1838) adhered, finding additional expenses.

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Statement.

The appellants appealed.

Appellants Argument.

Appellants. — The matter referred, and alone sub judice of the oversman, was the extent of the premises and their pertinents, and not the uses to which those pertinents might be applied; and although the necessity of a straw-yard might afford a good reason for the oversman allowing the use of the ground in dispute, it was ultra vires, and obviously not his intention, to limit the appellants to the use of the ground as a straw-yard merely, but to allow it to be used for any purpose that apertinent of the sort might not improperly be applied to. If the appellants chose to keep a piggery, a straw-yard was the most likely purpose to which the ground would be turned; but if they chose, instead of doing so, to use the ground more appropriately for providing accommodation to those engaged in the distillery, or to use their own roadway usefully, and undertook to remove the erections at the end of the lease, they could not be held as doing so in emulationem vicini, or contrary to the stipulations and purposes of the tack.

The respondent's counsel were not called upon.

" it. Whether either or both of the parties be quite reasonable and " accommodating, is not the question. Nor is it conclusive, as the " tenants seem to suppose, that the house is used for the purposes of the " distillery. If the oversman had been asked to give this piece of " ground for such a house, though for the distillery, it is plain from his " award that he would not. Having got it for depositing straw, the " tenants have no right to employ it for a quite different purpose; at " least not for one, without the landlord's consent, which may be of " material importance to him at the end of the lease, which is for only " seven years."

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Ld. Chancellor's Speech.

LORD CHANCELLOR.—Your Lordships time has certainly been uselessly occupied in the hearing of this case; and it is to be regretted that parties should come to your Lordships bar upon a subject like this, and in a case so clear as the present. The whole subject matter of contest is as to the title to a piece of land of thirty-three paces one way, and about fifteen the other, and the right of using it as a stack-yard for pigs.

The question arises under an agreement for a lease, which describes the property as property held by a former tenant. There are no metes or boundaries of any description given, but it enumerates a pigsty among the subjects let; and the question arising, whether the tenant had a right to use a piece of land adjoining the pigsty for the purpose of putting the straw upon it, it became the subject of reference, and the oversman found — (here his Lordship quoted the finding as to the stance for the straw-yard, and the access by a road). Now I do not understand the arbiter by that to intend to say, that he is of opinion that the site of the straw-yard is included in the description of the premises comprised in the agreement; but that he means to say that, inasmuch as there is a pigsty there, the landlord is bound to give the tenant the means of enjoying that which is let, and therefore that he thinks the landlord is bound to permit his tenant to put his straw-stack upon a piece of land,— not the tenant's ground, but the landlord's ground,—contiguous to the tenant's pigsty; in short, that the landlord is bound to afford that accommodation out of his own ground which will enable the tenant to enjoy the thing let; and the arbiter says, that the landlord must permit him to do so "for that purpose." But for that purpose the tenant has not claimed the use of it;

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but having permission to use it for that purpose, he endeavours to apply it to another not within the award, not within the agreement, and not within the intention of the parties with whom he is dealing.

In the same way he has a right of road awarded to him over land not his, but the landlord's; he has the right, for enjoying the part decerned to him, of going over that piece of land. That does not satisfy him, but he is desirous of converting that into his own property during the period of his lease, by erecting some sort of building upon it. That is converting an easement of land into a right of possession of the land itself, which is a totally different thing. When it is said that the land is a pertinent, it does not mean that the tenant is to have the right to such land, but that he is to have the right to use such contiguous land as an easement, or to enable him to occupy the land let to him. The right of the tenant is founded upon the award; the title he claims is under the award, and not under the original lease. Now if he founds his title upon that, he must take it as he finds it, and use it for the purpose for which the arbiter found he had a right to use it, and not for any other. I was never before called on to adjudicate in so small a matter as a pertinent to a pigsty, and I hope I shall never be again.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the respondent the costs incurred in respect of the appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless

the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

MACDOUGALL and UPTON — SPOTTISWOODE and ROBERTSON, Solicitors.

[28th *July* 1840.]

(No. 9.) JOHN THOMSON, Clerk to, and on behalf of, and as representing the General Commissioners of Police, Edinburgh, Appellant.[1]

[*Attorney General* (*Campbell*) — *Lord Advocate* (*Rutherfurd*).]

Ex parte.

JAMES MITCHELL, Respondent.

Public Officer — Edinburgh Police Acts. — Held (reversing the judgment of the Court of Session), that the commissioners of police, under the above acts, are not liable to be sued for damages for alleged acts of wilful oppression and cruelty by inferior officers, not done or ordered by the said commissioners.

1st DIVISION.

Lord Ordinary Fullerton.

Statement.

BY 3 Geo. 3. c. 78., one of the police acts of the city of Edinburgh, it was enacted, as to the general commissioners of police, under section 23d., "that it shall be "their duty, &c. to assess, &c. the sums of money "authorized for the purposes of this act; to appoint "collectors, clerks, &c.; to fix the number of lieu- "tenants, serjeants, watchmen, scavengers, and other "inferior officers to be employed, and wages to be paid "to them, and to increase or diminish their numbers "from time to time as they shall see cause; to make "orders and regulations relative to the lighting, "cleansing, guarding, watching, and patrolling the "streets, &c.;" by section 31. the commissioners "are "authorized and required to estimate and fix the

[1] 16 D., B., & M., 409; Fac. Coll., 1st Feb. 1838.

" sums of money necessary to be levied for the current " year for the purposes of this act, under the several " heads of lighting, cleansing, watching, surveyors, col- " lectors, and clerks salaries, and incidental expenses;" section 56. enacts, that " the monies to be raised by " virtue hereof shall be applied and laid out in defraying " the expenses of the police establishment in its various " branches, according to the annual estimates required " as before specified, and for the other purposes con- " tained in this act, and for no other purposes what- " ever;" section 59., " that it shall and may be lawful " to the Lord Provost of the city of Edinburgh, and " his Majesty's sheriff depute of the county of Edin- " burgh, and they are hereby empowered and required, " to nominate and appoint a fit person to be super- " intendent of police; and in the event of their differ- " ing as to such appointment, his Majesty's advocate " for the time being shall decide, and the said lord pro- " vost and sheriff depute shall have full power and " authority at all times to remove such superintendent " at their pleasure;" by section 60. power was given to five persons specified (not commissioners) on the requisition of the general commissioners, to dismiss the superintendent if they saw cause; by section 64. the general commissioners were appointed to fix the salary of the superintendent.

Section 65., regarding the appointment of watchmen, is as follows:—" And whereas it is expedient that " the superintendent of police so to be appointed shall, " as far as possible, be made answerable for the conduct " of the watchmen and other officers of the department " acting under his orders, be it enacted, that as often " as the said general commissioners shall fix the number

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" of lieutenants, serjeants, watchmen, and other inferior " officers of police they shall judge necessary for guard- " ing, patrolling, and watching within the limits of this " act, and to direct their distribution among the different " wards, it shall and may be lawful to the said super- " intendent, and he is hereby authorized and empow- " ered, to appoint proper persons for the above duty, " to direct their distribution within the different wards, " and to remove them at pleasure; and the said super- " intendent, lieutenants, serjeants, watchmen, and other " inferior officers appointed by the said superintendent " shall have and exercise all the powers belonging to " constables by the law of Scotland;" section 66., " it " shall be the duty of the said superintendent of police, " and of the officers of the watching department to be ap- " pointed by him, to guard, patrol, and watch the " streets, ways, and passages within the bounds of police " herein-before described, according to regulations to " be prescribed by the said superintendent of police " under the control of the said general commissioners, " and to apprehend and bring before the magistrates, " &c., all persons who may be found within the said " bounds, actually committing any criminal, riotous, or " disorderly act, or accused or suspected of having com- " mitted any such act," &c. The superintendent was also enjoined to carry into effect the regulations laid down by the general commissioners " for the proper " guarding, patrolling, and watching the streets," &c. Section 107. provided that the sheriff depute or substitute or any of the magistrates of Edinburgh might punish or dismiss watchmen whenever it appeared proper to do so; section 134, " that no action shall be commenced against " the judges, commissioners, superintendent, or any other

" person or persons for any thing done in the execution " of this act, in any case, unless wilful corruption or " oppression or culpable negligence, out of which real " injury has arisen, be charged, nor in any event shall " such action be competent after three calendar months " from the time the fact is committed."

By subsequent statutes, particularly 7 Geo. 4. c. 115. and 2 Will. 4. c. 87., many of the provisions of the above statute were altered; but in other respects the above statute was re-enacted, and it was kept in force in reference to the provisions above cited. By 2 Will. 4. c. 87. s. 18. it was provided " that the said general commis- " sioners may sue or be sued for any thing done or " ordered by them in virtue of this act, and for recovery " of the penalties and forfeitures before mentioned, in " the name of their clerk, collector, or treasurer for the " time being."

In 1836 Mr. John Thomson, the appellant, was clerk, and Mr. James Stuart superintendent, of the Edinburgh police.

James Mitchell raised a summons against the said John Thompson and James Stuart, libelling on the above statutes, and stating, that on the evening of 30th November 1836, as he was going peaceably homewards through the streets of Edinburgh along with his wife and John Henderson, herb distiller, Edinburgh, he fell, the streets being slippery from frost; that Erick Mackay, or some other of the night watchmen, came up to him, and falsely alleging that he had been fighting, insisted on taking him to the nearest watch-house; that the pursuer refused, and Mackay called up four other night watchmen, who seized the pursuer and his companions, two of them collaring the pursuer, who assured them that he was

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merely going peaceably home, and refused to go to the watch-house; that thereupon the said Erick Mackay, or one or other of the five police men in whose custody he now was, and whose name, as distinguished from the rest, is to the pursuer unknown, did with his baton strike the pursuer with all his might across his leg. The summons subsumed:—"And although the pursuer has "often desired and required the said Erick Mackay, as "also the said James Stuart and John Thomson, de- "fenders on behalf of and as representing the said "commissioners of the Edinburgh police establishment, "conjunctly and severally, or severally, to make repa- "ration to the pursuer in the premises, yet they refuse, "at least delay, so to do;" and concluded, "therefore "the said defenders ought and should be decerned and "ordained by decree conjunctly and severally to make "payment to the pursuer of the sum of 1,000*l.* sterling "in name of damages, and as a solatium to the pursuer "for the injuries sustained, and still to be sustained by "him through the illegal, oppressive, wilfully tyran- "nical, and cruel treatment, and the brutal outrage "inflicted upon him in manner before specified."

In defence, Stuart pleaded, inter alia, that the statutes did not authorize the commissioners to sue or be sued in name of the superintendent.

The appellant pleaded in defence, in the first instance, that the commissioners of police, as represented by him as their clerk, were not liable, in respect that no relevant or competent ground of action had been libelled against them officially, and that the wrong complained of was not, as required by statute, on which alone the action was laid, said to have been done or ordered by them.

The Lord Ordinary, 11th July 1837, pronounced the following interlocutor:—"The Lord Ordinary, having "heard parties procurators, and considered the sum- "mons and defences, sustains the first defence of the "defender James Stuart, and also sustains the first "defence for the commissioners of police: Finds that "both of these defences are preliminary, and exclusive "of the summons as now laid; and therefore, in regard "to these parties, dismisses the action, and decerns: "Finds them entitled to their expenses, and allows an "account thereof to be given in, and to be taxed by "the auditor; and in regard to the defender Mackay, "appoints the cause to be enrolled, that parties may "be heard on its farther preparation."[1]

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[1] "*Note.*—The Lord Ordinary gives no opinion on the question, how "far it is incompetent in any circumstances, and under any form of "action, to render the commissioners of police, as the administrators of "the funds levied for the protection of the inhabitants, answerable for "the misconduct of the watchmen, or other subordinate officers. The "only point here, properly preliminary, is, whether or not the present "summons can be sustained as legitimately raising the question of "liability, and he is of opinion that it cannot. In so far as the commis- "sioners are concerned, it is rested on the 18th section of the Police Act, "authorizing the general commissioners 'to sue or to be sued in the "'name of their clerk, collector, or treasurer for the time being.' And "accordingly John Thomson, the present clerk of the police establish- "ment, is called and concluded against, as representing the commis- "sioners. But the clause in the statute referred to is expressly limited "to the case of the commissioners suing or being sued for any thing "'done or ordered by them in virtue of this act.' And the summons "certainly sets forth nothing which falls under that description. Accord- "ingly at the debate the case against the commissioners appeared to be "rested not so much on the statute as on the responsibility at common "law for the subordinate officers employed by and paid out of the funds "of the police. It is evident that in an action on that head, it would be "requisite to give some much more distinct intimation of the nature and "ground of that liability, than is to be found in the present summons. "But at all events, that ground of action is totally different from that of "the acts libelled being 'done or ordered by them in virtue of the "'statute,' which, as has been already mentioned, is the indispensible

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Judgment of Court, 1st Feb. 1838.

Mitchell the pursuer reclaimed, when the Court pronounced the following judgment:—"1st February 1838. "The Lords having advised this reclaiming note, and "heard counsel for the parties, adhere to the interlocutor reclaimed against, in so far as it assoilzies James "Stuart; and to that extent refuse the desire of the "reclaiming note, and of new find the said James "Stuart entitled to expenses, and remit the account "thereof to the auditor to tax the same and report: "Recal the said interlocutor in so far as it sustains

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"condition of the competency of any procedure against them through "the medium of their clerk, collector, or treasurer.

"2dly. As to Stuart, the superintendent, the case is, if possible, "clearer. He, it will be observed, is not called or concluded against "personally in the summons. He is coupled with the commissioners of "police of the city of Edinburgh, 'as answerable for the proceedings "'and conduct of their officers;' and 'the said James Stuart and John "'Thomson' are described as 'defenders on behalf of and as repre-"'senting the said commissioners of the Edinburgh police establish-"'ment, conjunctly and severally, or severally,' &c. In short, it "appears from the summons as laid, that Stuart is called, like the "defender Thomson, only for the purpose of reaching the commis-"sioners as administrators of the police funds. It is true, that at the "debate the pursuer proposed to amend the summons by striking out "the letter 's' at the end of the word 'defenders,' in the passage last "quoted; by which amendment it seemed to be thought it might be "converted into a summons, personally concluding against Stuart the "superintendent; but the Lord Ordinary does not think that such an "amendment can be received. It is clear from the whole structure of "the summons, that it is not directed personally against Stuart. In "that part of it which sets out his liability, he is joined with the com-"missioners of police of the city of Edinburgh, against whom no per-"sonal liability is alleged; and, besides, there is not a single fact or "ground in law set forth for holding the defender, the superintendent of "police, personally liable for the misconduct of the watchmen,—a "responsibility so novel and so extensive in its operation as to require "some very distinct statement indeed of the grounds on which it is "rested; so that even if the summons could be construed as directed per-"sonally against the superintendent, it is defective in another essential "particular, inasmuch as it does not, in compliance with the judicature "act, set forth the grounds of the action in terms sufficiently positive "and clear, so as relevantly and legally to deduce the conclusions against "the defender."

" the first defence for the commissioners of police, and " find them entitled to expenses, dismissing the action: " Find the action competent as laid against the said " commissioners, and remit to the Lord Ordinary " to proceed as shall be just; reserving all questions " of expenses between the said commissioners and the " pursuer. Quoad ultra, adhere to the interlocutor " reclaimed against."

28th July 1840

Statement.

The appellant appealed. No case was delivered for the pursuer, and the cause was heard ex parte.

Appellant's Argument.

Appellant.—The judgment of the Court altering the interlocutor of the Lord Ordinary was erroneous, inasmuch as it overlooked the express provisions of the statutes, by which the commissioners could only be sued for any delict done or ordered by them. Their ground of exemption from liability has been clearly stated by Lord Moncreiff, as Ordinary, in his interlocutor (12th January 1836) in a previous case of Smith v. the Police Commissioners, and the appellant now avails himself of his Lordship's opinion[1] in that case, as the

[1] " *Note.*—The Lord Ordinary is very clearly of opinion that the " action cannot be maintained against the commissioners. The 18th sec- " tion of the statute, quoted in the summons, page 6, provides that the " commissioners may sue or be sued by their clerk ' for any thing done " ' or ordered by them in virtue of this act, and for the recovery of the " ' penalties,' &c. Is there any thing set forth in the summons, as " having been done or ordered by the commissioners, which is founded " on as the ground of action? Certainly nothing. Therefore, sup- " posing that the commissioners could be otherwise liable for the things " complained of, it must be by personal action and citation. They " cannot be sued by their clerk for acts or orders which, by the showing " of the summons, were not their acts or orders, but the acts or orders " of others. Yet the pursuer disclaimed in the debate any plea of per- " sonal liability. This is one short view of the incompetency. But, " secondly, the Lord Ordinary is clear, that the commissioners are not " liable for any acts of the superintendent, in matters with which they " have no interference. The statute affords no countenance to this. " Their duties are financial and fiscal. They have not the power of

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best argument for a reversal. The question has also more recently been settled in the analogous case of Duncan v. Findlater, in the House of Lords. (M'Lean and Robinson, 911.)

Appellant's Argument.

The *Lord Chancellor*.—I do not see how this judgment can be supported, but I shall take till to-morrow to look into the papers, and the report of Duncan v. Findlater.

Judgment deferred.

Ld. Chancellor's Speech.

The LORD CHANCELLOR.—My Lords, in this cause, which was heard before your Lordships yesterday, I have taken an opportunity of looking into the case, and also of referring to the report of the decision of this House in the case of Duncan v. Findlater, and it certainly does appear that the principle established by that decision applies in all respects to this. But there are in this case circumstances, arising out of the provisions of the police acts, which make it still more clear that the judgment of the Court below ought to be reversed.

It appears, in the first place, that the watchman who actually committed the alleged injury was not appointed by the commissioners against whose clerk the action is brought. Their duty certainly is to provide funds; but

" appointing the superintendent, (see sec. 59), and no interference with " the criminal department, except to fix the number of officers. Neither " can they be liable at common law. They are not in the situation of " masters, not having the power of appointment, and the duties being of " a public nature, for which the party himself can alone be responsible. " The procurator fiscal in the Sheriff Court is named by the sheriff, yet " it would be somewhat extravagant to make the sheriff answerable for " the wilful wrongs of a procurator fiscal. 3dly, Either Stuart acted in " conformity to the statute, in which case, by section 134, the action will " not lie against him, or he violated his duty, and did something not " warranted by the statute, in which case it is a personal act for which " the commissioners cannot be liable. Lastly, the Lord Ordinary is " strongly inclined to think that the commissioners have no funds which " can be made liable for the acts of the officers."

the individual who committed the injury was not in any sense their agent. There is also a difficulty arising from the 18th section of the act, which provides that they shall only be sued in name of their clerk in respect of some act done or ordered by them. These are the circumstances which distinguish this case, even if the judgment below were not met by the judgment in Duncan v. Findlater.

I find that the circumstance of this case having been heard ex parte is not attributable, as was stated from the bar, to that judgment of this House last session. For I find, in the observations I made to the House on that occasion[1], that I had my attention drawn to the dependence of the present case, and being informed that this case would raise the same question, I enquired how that matter stood, thinking it probable that the House might feel it right to have this case heard before deciding Duncan v. Findlater; but I then found that the present case had been set down ex parte, and therefore it was not to be expected the House would derive much information from the discussion of it. It was set down ex parte, therefore, before the parties were aware what course the House would adopt in the case of Duncan v. Findlater.

I have much satisfaction in finding that the decision this House has come to has the sanction of Lord Moncreiff and Lord Fullerton, expressed at a period before this question was first discussed at your lordships bar. For I find that in January 1836 Lord Moncreiff, in the case of the Commissioners of Police, founded on by the appellant (ante p. 169.) expresses an opinion consistent with that adopted by your lordships; and that in this case Lord Fullerton expressed a similar

[1] M'Lean & Robinson, 924.

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opinion. There was not, therefore, that unanimity among the judges in the Court of Session, which might seem to exist when the case was disposed of by the Inner House; for we have the authority of those two learned judges, who, at periods before this question was discussed in this House, had expressed opinions contrary to that of the Inner House, and in conformity with the principle ultimately sanctioned in this House. I would therefore advise your Lordships to reverse the judgment of the Court of Session.

Mr. *Attorney General* moved, that the House do direct that the appellant be allowed his costs in the Court below, subsequent to the date of the Lord Ordinary's interlocutor, which did allow him costs.

The *Lord Chancellor.*—I think this House ought now to make such an order as it is of opinion the Court of Session ought to have made; i. e. to adhere to the interlocutor of the Lord Ordinary, with expenses.

The House of Lords ordered and adjudged, That the said interlocutor appealed from in the said appeal, in so far as the same is therein appealed from, be and the same is hereby reversed: And it is further ordered, That the said James Mitchell (the pursuer in the action of damages mentioned in the said appeal) do pay or cause to be paid to the said John Thomson the appellant, or to the clerk for the time being of the general commissioners of police for the city of Edinburgh and the adjoining districts, all the costs and expenses incurred in the said Court of Session, as well before the Lord Ordinary as before the Inner House thereof, by the said John Thomson, as representing the said commissioners of police in defending the said action: And it is further ordered, That with this declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

RICHARDSON and CONNELL, Solicitors.

[*30th July* 1840.]

Mrs. SOPHIA HOGGAN or SMITH, Relict of Alexander Smith, Esquire, of Land, Appellant.[1] (No. 10.)

[*Lord Advocate (Murray) — P. Shaw.*]

THOMAS RANKEN, S. S. C., Respondent.

[*Sir W. Follett — Forbes.*]

Sasine — Writ — Vitiation.—Held (affirming the judgment of the Court of Session), that an instrument of sasine was null and void, the word "three" in the year of the Christian era (one thousand eight hundred and three), denoting the date of the sasine, being written upon an erasure.

Observed by Lord Brougham, in reference to the judgment of the Court of Session in Gordon v. Earl of Fife[2], (not appealed,) "I must fairly add that I do not go very willingly or indeed very easily along with that decision, and "that the judgment delivered by the Lord President "Hope, and in which Lords Gillies, Alloway, Eldin, and "Corehouse concurred, would have satisfied my mind."— See page 207, infra.

2D DIVISION.

Lord Ordinary Mackenzie.

Statement.

ALEXANDER SMITH of Land, now deceased, the husband of the appellant, purchased the lands of Monygryle and Pointfoot in the year 1801. The disposition in his favour was executed on 26th August 1801; and in virtue of the precept of sasine which it contained Mr. Smith was infeft in the lands on 2d of September 1803. The instrument of sasine was duly registered in

[1] 13 S., D., & B., 461; Fac. Coll., 13th Feb. 1835.

[2] 9th March 1827, Fac. Coll.; 5 S. & D. 517.

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the particular register of sasines at Dumfries, on the 14th September 1803.

The appellant was married to Mr. Smith in the year 1807; there was no contract entered into; but he was then proprietor of and stood infeft in considerable landed property. Mr. Smith died intestate in July 1827. He left merely a bond of provision in favour of his children, containing a nomination of tutors and curators to them.

At Mr. Smith's death his affairs were involved, but it was supposed that after paying his debts there would remain a considerable reversion to his children, all of whom were then in minority; and the eldest son and his curators continued in possession of the landed estates. Instead, however, of having left a reversion to his children after paying his debts, it turned out that Mr. Smith was bankrupt; and a process of ranking and sale was brought by the creditors.

As there had been no contract of marriage betwixt the appellant and her husband, she was entitled to her terce of all the lands in which he died infeft, in so far as any of them or their proceeds remained over after satisfying the claims of heritable creditors, and she therefore preferred a claim in the process, inter alia, for terce out of the lands of Monygryle and Pointfoot. The instrument of sasine in her husband's favour was in its invocation expressed thus:—"In the name of God, Amen. "Be it known to all men by this present public instru- "ment, that, upon the second day of September in the "year of our Lord one thousand eight hundred and "three, and of the reign of our sovereign Lord George "the third, by the grace of God, king of the United "Kingdom of Great Britain and Ireland, defender of

"the faith, the forty-third year, in presence of me, "notary public, and the witnesses subscribing, appeared "personally," &c.

Statement.

In the principal instrument the word "three" in the year of our Lord, and also the connecting word "and" which follows, were written or superinduced upon erasures. The record of the instrument was free from erasure.

The respondent, Mr. Ranken, who had been appointed common agent for the creditors, objected to the claim of the appellant on the ground that the instrument of sasine was vitiated and erased in the date.

The Lord Ordinary, by an interlocutor dated the 18th January 1834, found, "that the appellant was not "barred from claiming terce out of the estate of her "late husband, but that the said Alexander Smith was "not validly seised in the lands of Monygryle and "Pointfoot."

Judgment of Court. 13th July 1835.

The appellant having reclaimed to the Second Division, minutes of debate were ordered, and the Court being divided the opinions of the other judges were taken[1], when their Lordships (13th July 1835) adhered to the interlocutor of the Lord Ordinary.

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[1] Opinions of the Lord President, and Lords Balgray, Gillies, Mackenzie, and Corehouse.

"We are of opinion that the objection to the seisin in question, that "the word three in the date of the year of our Lord is written on "an erasure, is a good objection.

"A seisin is an actus legitimus; and in all such, therefore, the "solemnities and forms fixed by statute or by immemorial usage must "be strictly adhered to. In the case of a seisin, it has been the "form from time immemorial, that it shall mention the date both of "the christian era and of the king's reign; and it is remarkable that "this requisite is not necessary even in the disposition or heritable bond "on which the seisin proceeds. We must hold, therefore, that this "double date has been required in a seisin, that the one may be a check

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Appellant's Argument.

The appellant appealed.

Appellant.—Whether an erasure is material or not, and such as to infer a nullity in a deed or instrument, must always depend on the circumstances of the parti-

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" on the other; so that by means of this precaution the true date may " be more certainly ascertained. And it is the more necessary that " great precision should be required in the date of the seisin with refer- " ence to the registration, which, to be effectual against third parties, " must be done within a given period.

" In this case the word three being written on an erasure, it must be " held that some other word had been originally written, but afterwards " rubbed out, in order that the word three might be substituted in its " place:—e. g. that the date was originally 1801 or 1802, or 1804 or " 1805, which, as neither of these corresponded with the 43d of the " king, would have rendered the true date quite uncertain. Therefore " it must be held that there was originally no date at all, by which the " time allowed for registration could be regulated. But if the date was " originally wrong as being uncertain, it could not be remedied by the " summary mode of inserting what is said to be the proper date, by " means of an erasure of the wrong one. There are legitimate modes of " rectifying such mistakes which are well known in practice, and none of " these having been adopted in this case, the erasure must be held to be " fatal to the deed.

" The nullity cannot be rectified by the mere fact of registration, " because the clerks at the register office must record every deed that is " presented to them for that purpose exactly as it stands, for they are " not entitled to judge whether it is valid or not.

" It is also proper to remark, that when an estate is to be purchased, " or money lent on the security of an estate, the agent of the purchaser " or lender never contents himself with the production to him of extracts " of seisins or other deeds, but always calls for and examines the seisins " themselves, and other principal deeds; because, besides erasures, there " are other fatal objections which cannot be discovered from the records; " such as forgery,—the existence of a nearer heir,—objections on the " ground of death-bed. Against such objections he must satisfy himself " aliunde, or rely on the clause of warrandice; for the records, however " valuable in other respects, neither do nor by possibility can afford pro- " tection to purchasers or creditors in all cases.

" But against an objection arising from an erasure the party can " easily guard by examining the principal seisin, which every agent who " knows any thing of his duty always does.

" This is no doubt a hard case, but there is no help for it; and in this " case the objection, however late in point of time, was stated as " soon as the interests of the party made it competent to do so.

cular case. A deed is not necessarily to be annulled because a word is written on an erasure, provided what

Opinion of Lord Moncreiff, concurred in by Lords Fullerton and Jeffrey.

"I concur entirely in the substance and conclusion of the Lord President's opinion. I conceive it to be a very clear matter of law, that "the registers were never intended to supersede the original instruments "as the essential grounds and evidence of the title when called for, or to "relieve such title deeds from any fundamental defects or nullities. "When therefore such an instrument is produced, the question whether "it is liable to any objection of nullity must altogether depend on the "nature and condition of the deed itself.

"It is essential to the validity of every instrument of seisin, that it "should bear the date both of the Christian era and of the king's reign. "This fixed rule is, I conceive, independent of the system of registration, "and it has not been altered by any of the statutes on that subject, "though the importance of it may be increased by them. These dates, "therefore, are inter essentialia of the instrument.

"It is an established principle of the law of Scotland, that in all writs "of importance, and especially in instruments of seisin, erasures in substantialibus are to be held as vitiations of the writ inferring nullity. I "think it unnecessary to inquire into the presumptions on which this "doctrine of the law is founded, the rule itself being settled and indisputable.

"The question whether a particular erasure is in substantialibus or "not sometimes may depend on circumstances in the position and connexion of the word or term which is written on it, but in other cases is "at once determined by the nature of the word or term itself as essential "to the deed.

"In the present case, the word admitted to be written on an erasure "is that which denotes the year of the christian era; and that being so "essential to the validity of the instrument that it cannot be read "without it, it must in my opinion be a case of erasure in substantialibus.

"Having this view of the law applicable to the case, I humbly conceive that such an objection cannot be obviated by any reasoning of "presumptions or probabilities, derived either from the year of the "king's reign being fairly written (that being equally essential by "itself), or from the state of the copy engrossed in the register, or from "extraneous circumstances; and further, that all arguments against the "application of the rule of law to such a case, founded on the idea that "the register ought to overrule or supersede the principal instrument, or "relieve it from nullities of this description—or on supposed danger to "parties who may look at the register alone,—are inconsistent with the "established law on the subject, and altogether irrelevant to the present "question."

HOGGAN v. RANKEN. 30th July 1840. Appellant's Argument.

precedes and what follows the erased word show, as in the case of an instrument of sasine, what the true word really is; here every presumption or notion that the word "three" has been falsified is excluded by the fact that the year of the king's reign is not disputed to be correctly stated in the instrument. No verba solemnia are required in an instrument of sasine; it is sufficient that on the face of the instrument it shall appear that on a particular day, in a particular month, and in a particular year that took place which it is the object of the instrument to certify. Even if the word "three" had been left blank, there would have been still sufficient legal evidence of its date. There is no statute which requires, under pain of nullity, that a notarial instrument shall prove its date in two ways, though, as a check against fraud and falsehood, the usage is to state the year in two ways. Nothing appears, from inspection of the instrument, to show that the dates according to the Christian era and the king's reign were originally different, and an assumption that the correction was made after the instrument was signed by the notary cannot be admitted. The correction was evidently made at the same time the instrument was extended, and before the solemnity of giving sasine to Mr. Alexander Smith by the notary took place, and it is manifest, from an inspection of the instrument, that the correction was made by the same hand and with the same pen and ink as had been used in extending the instrument. Clearly there was no fraud intended, and none is imputed. The effect of the interlocutor appealed from then is, that, in the absence of fraud, the mere correction of a blot or mistake in an instrument of

sasine renders that instrument null and void to all intents and purposes.[1]

Respondent.—It is an established rule of law in Scotland that deeds vitiated in substantialibus are invalid, and it being the object of law to preserve those deeds which have been truly executed pure and unaltered, a deed must show ex facie that it has not been altered or vitiated since it was executed; but if it be erased and vitiated, no reasonable confidence can be entertained that it remains in the state in which it was produced. The vitiation is not proved by the deed to have been part of the writing at the time of the execution, and the jealousy of the law goes so far as even to presume against it that the vitiation has been afterwards made and is fraudulent if it is in an important part of the writing, and more especially where the vitiation is not mentioned in the notary's docquet. It is not denied that vitiations to be fatal must be in substantialibus, and

[1] *Appellant's Authorities.*—Ersk. b. ii. tit. 9. s. 44. and 46; 1 Bell's Com. 59; Rose v. Fraser, 26th Jan. 1790; Mor. App., voce "Terce," No. 1.; Ersk. (Ivory), p. 428, note 223; Hamilton v. Boswell, 15th June 1716, Mor. 3117; Mitchell and Co. v. Stevenson and Co., in House of Lords, 4th April 1831; Lockhart v. Hamilton, 5th March 1706; Mor. 16939; Adam v. Drummond, 12th June 1810, Fac. Coll. xv. 691, No. 233; Hamilton, 4th Jan. 1824; 2 S. & D., p. 640; Gordon v. Earl of Fife, 9th March 1827, 5 S. & D. p. 517, (but as to authority of that case, see post, p. 207); Gaywood v. M'Eand, 19th June 1828, 6 S. & D., p. 991; Morton v. Hunters and Co., 10th Dec. 1828, 7 S. & D., p. 172; affirmed 26th Nov. 1830, 4 W. & S. p. 379; Earl of Cassilis v. Kennedy, 3d June 1831, 9 S. & D. p. 663; see also Stair, b. ii. tit. 3, s. 17. 18., and b. iv. tit. 12. s. 19; 2 Ross, 181; Henderson v. Dalrymple, 6th March 1776, Fac. Coll., vii. 201, No. 225, Ap. 1, Mem. of Par., No. 2.; Lord Hailes's Decis., p. 695; Livingston v. Napier, 3d March 1762, Fol. Dic. iv. 335; Mor. 15418; Gordon v. Brodie, 20th July 1773, Bell's Election Laws, p. 258; Tait's Coll. Brown's Supp., vol. v. p. 587; Douglas v. Chalmers, 3d March 1762; Brown's Supp., vol. v. p. 587; Morrison v. Ramsay, 16th Dec. 1826; 5 S. & D. 150.

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what points are de substantialibus must be determined by the nature of the writ; all which occur in the description or specification of the subjects conveyed, or in the sum, or in the term of years, or in other similar clauses of a deed are vitiations in substantialibus. The date of an instrument of sasine is of the utmost importance, as affording the only means of ascertaining whether it has been recorded within the sixty days, and being thus absolutely essential to its validity.

Immemorial practice, as stated by the text writers, has required two dates in the case of instruments of sasine, viz. the date of the Christian era and of the reign of the king; the two dates must therefore be consistent, or the instrument has no date. The vitiation which occurs in the date of the present instrument proves that the year of the Christian era originally inserted must have been different from the one now inserted in the instrument, and it follows, as a legal presumption, that it was different when the deed was executed. It is said by the appellant, that the effect of the vitiation in the year of the Christian era is only to cause that part of the date to be held pro non scripto, and that there still remains the year of the king's reign to supply the date of the instrument, and to show that it has been properly recorded; but the answer is, that there is no authority, either in principle or practice, for dispensing with the invariable style of pointing out the date of the instrument both by the year of the Christian era and of the king's reign; neither is this a case in which one date only has been ab initio employed, for the use of two dates has been resorted to, and as the instrument originally stood it is obvious that these date must have been disconform to each other, and it must

have been to remedy that discrepancy that the vitiation was effected subsequently to execution, such discrepancy being fatal to the deed. A vitiation in one or other of the dates of an instrument in which two have been employed is in principle as objectionable as if both had been written on erasures, and the whole authority of a deed depends upon its being entire and without a vitiation. In the present instance, and supposing that the only effect of an erasure in law is that the letters or word erased must be held pro non scripto, by striking out 3 the date is left 180, and thus creates the same defect as if an inconsistent date or no date whatever were specified. There is no hardship in the rule of law as contended for by the respondents, because, even although an erasure is in substantialibus, the effect of it may be removed if, in the testing clause of a deed, or the notary's docquet in the case of a sasine, the erasure is noticed and the words written upon it specified. The rule of law now contended for applies especially to an instrument of sasine, not only because it is actus legitimus, but because the notarial instrument is the only admissible evidence that sasine had been taken.[1]

Judgment in this and the two succeeding causes was given at the same time. The opinion delivered by Lord Brougham in moving the judgment of affirmance, concurred in by the Earl of Devon, will be found in the report of Lord Strathmore's case, No. 12. post, p. 189.

[1] *Respondent's Authorities.* — Balfour, p. 368; Spottiswood, p. 164; Erak., b. iii. tit. 2. s. 20; Ross's Lectures, i. 145; Stair, b. iv. tit. 12. s. 19., and b. ii. tit. 3. s. 17; A. v. B., 22d July 1625, Mor. 16925; Laurie v. Reid, 9th July 1712; Fount. i. 731; Mor. 12284; Innes v. Earl of Fife, 10th March 1827; 5 S. & D., p. 559; Stewart, 20th Feb. 1827, 5 S & D., p. 383; Dennistoun v. Speirs, 16th Nov. 1824, 3 S. & D., p. 285; M'Queen v. Nairne, 23d Jan. 1824, 2 S. & D., p. 637.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed.

DEANS and DUNLOP — RICHARDSON and CONNELL, Solicitors.

[30*th July* 1840.]

JOHN KEDDER or CALDER, Appellant.[1] (No. 11.)

[*Lord Advocate* (*Murray*)—*Sir W. Follett.*]

Mrs. ISOBEL REID and others, Respondents.

[*Attorney General* (*Campbell*)—*Dr. Lushington.*]

Et e contra.

Writ — Vitiation. — In a mortis causa disposition of lands the letters "ohn" in the word "John," the Christian name of the apparent disponee, were written on erasures throughout the body of the deed. It was admitted, that the word "James" had stood in place of "John" throughout. In the testing clause, after the words "are sub-"scribed," there were inserted the words "in favour of "the said John Kedder my son," but no notice was therein taken of the erasures which existed in the body of the deed: — Held (affirming the judgment of the Court of Session), that the deed was invalid.

Proof — Writ. — Held (affirming the judgment of the Court of Session) incompetent to allow proof by the writer and instrumentary witnesses that important words in a deed were written upon erasures in presence of the grantor, before or at the time of his subscribing the deed, and that the testing clause was filled up in his presence.

Writ — Testing Clause. — Observed per Lord Brougham, "The practice of postponing the filling up" (the testing clause) "is greatly to be discountenanced, and where it "is necessary after execution to take notice in the testing "clause of an erasure or alteration, such testing clause

[1] 12 S., D., & B., 681, and 13 S., D., & B., 619; and Fac. Coll.

" should not be filled up, unless accompanied with some " act by the maker of the instrument, evidencing that he " was conusant of the notice in the testing clause."

Costs.—There cannot be a cross appeal merely as to the question of costs.—See p. 218.

1st Division.

Lords Ordinary Moncreiff and Cockburn.

THE late Mr. James Kedder of Daviesdykes executed a mortis causa disposition, purporting ex facie to be in favour of a natural son, John Kedder, but the christian name of the apparent grantee, with the exception of the initial letter " J," was written on an erasure in the body of the deed. In two places the word " junior " formed part of the designation, a term inapplicable to the party whose name appeared over the erasure. The testing clause ran thus: " In witness, &c., these pre- " sents, written upon this and the two preceding pages " of stamped paper by James Naismyth, apprentice " to William Hamilton, written in Hamilton, are sub- " scribed by me, in favour of the said John Kedder, " my son, at Daviesdykes, &c., before these witnesses, " the said William Hamilton, David Marshall, esq., " of Mill-land, and the said James Naismyth, writer " hereof." No erasure occurred in the testing clause, but no reference was therein made to any erasure in the deed.

An action of reduction was brought by the respondents, who are distant relations and heirs-at-law of the grantor of the deed, in November 1830, on the ground that the name John was written on an erasure throughout the deed, except in the testing clause, which bore, " subscribed by me in favour of the said John Kedder, " my son, at Daviesdykes, this 6th day of October " 1810," &c. The appellant was described as residing at Kirkhall; and although the grantor had other two

illegitimate sons, James and Thomas, neither of them resided at Kirkhall.

It was admitted that the word "John," throughout the deed, had been originally written "James;" but it was alleged that the mistake was noticed by the grantor when the deed was read over to him, and the name written correctly in the testing clause, and corrected throughout the other parts of the deed in the testator's presence before signing.

Lord Moncreiff, before whom the cause originally depended, found that this latter averment might be competently proved by the writer and instrumentary witnesses, but the Court, on 24th June 1834, altered, and found that such proof was not competent.

The case having come to depend before Lord Cockburn, as junior Lord Ordinary, his Lordship (9th December 1834) pronounced this interlocutor:—

"Finds, that the deed of 6th October 1810, sought "to be reduced, is invalid, and therefore reduces the "same, as also the instrument of sasine following there-"on, and decerns: Finds the pursuers entitled to the "expenses incurred by them in discussing the re-"ductive conclusions: Appoints an account thereof to "be given in; and, when lodged, remits the same to "the auditor to tax, and report: Quoad ultra, appoints "parties to be heard."[1]

[1] The above interlocutor was accompanied by the following note:—

"The summons contains conclusions for removing and for past "profits. It is in reference to these that the Lord Ordinary has ap-"pointed the parties to be heard, as these matters have not yet been "discussed, and could scarcely be so till the validity of the deed should "be finally determined. As to the reduction, the Court having decided "that the evidence which Lord Moncreiff had directed to be received is "inadmissible, the deed must be considered strictly by itself, and no "regard can be paid to the moral probabilities urged on either side.

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Thereafter, on 16th December 1834, his Lordship, "having heard parties procurators on a motion by the "pursuers for a decree of removing, refuses the motion,

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"Now, it is admitted that the word John is written upon erasures, "except where it occurs in the testing clause, and that the erased word "was James. This erasure occurs in the most important part of the "deed, the name of the disponee, and is in every part where this name "is; and the sole question is, whether the objection arising from the "vitiation has been legally removed by the testing clause? This clause "declares, that 'these presents' are subscribed by the granter 'in favour "'of the said John Kedder, my son,' and the specification of John in "this clause is said by the defender to be a sufficient legal correction of "the error and of the vitiation in the body of the instrument, especially "as a christian name was not necessary, and as the deed contains words "(such as, 'residing at Kirkhall, my son') which adequately denote the "person meant. But here the granter, whether necessarily or not, chose "to designate his disponee by the christian name, and has thus made the "word essential. Now the testing clause is not only inadequate, but, "in reference to legal precedent, it is dangerous as a substitute for the "original use of the right name, or as a correction of this essential "erasure; because, so far as appears from the deed, there is not enough "to exclude the supposition that James may have been the person truly "meant,—that this word may have been erased, and John put in after "signature,—and that the testing clause may have been made to suit "the instrument thus altered; and as testing clauses are generally filled "in after subscription, this may often be done. There is said to be a "legal presumption, that testing clauses are written before subscription; "but any such presumption must be controlled by the circumstances "appearing on the instrument. Now the two last words of this testing "clause, viz. 'writer hereof,' though they were superfluous, have evi-"dently been added after the granter's signature, and by a different "hand. But independently of this, the very mode in which the alleged "error has been attempted to be corrected, seems inconsistent with the "idea that it was discovered prior to subscription; because, if it had "been known, it is scarcely credible that it would not have been cor-"rected fully and directly, and by express words, especially as there was "a whole page left clear, instead of merely slipping in the word John, "without even noticing any erasure. But assuming the clause to have "been written before the granter signed, it does not follow from any "thing it contains, that the word James had been previously erased. "Even 'the said John,' which is what the defender relies on, does not "establish that there was such a name in the deed at any time; for, that "word being on an erasure, is in law not there at all. There are cases "where a slighter defect has proved fatal; but none where one so strong "has been disregarded. The subsequent filling in of testing clauses "being legal and usual, it is impossible not to see the consequences of

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" in respect that the interlocutor reducing the deed is " not final, and the defender states that he means to " reclaim."

The respondents reclaimed against this last interlocutor, and the appellant against the interlocutor of 9th December.

Judgment of Court, 6th Mar. 1835.

The Court, on the note for the appellant, pronounced this interlocutor:—" Adhere, except as to expenses; " alter in that respect, and find no expenses due." And on the note for the respondent pronounced this interlocutor:—" Alter the interlocutor reclaimed against, " and decern in the removing prayed for; quoad ultra, " remit to the Lord Ordinary to hear parties, and to " do further in the cause as shall be just."[1]

" allowing one name to be changed for another, by erasing the one first " inserted, and then without openly noticing this putting a new name to " fit it into the testing clause."

[1] *Appellant's Authorities.*—(*As to vitiation.*) Keillor v. Thomson's Trustees, 3 S. & D. 396; Ersk. b. iii. tit. 9. s. 8; Stair, b. iv. tit. 42. s. 19; Adam v. Drummond, 12th June 1810, Fac. Coll.; Wright v. M'Leod, 8th Feb. 1672, Mor. 11440; Lockhart v. Hamilton, 5th March 1706, Mor. 16939; Livingston v. Napier, 3d March 1762, affirmed 11th March 1765, 31 Lords Jour. 71; Gordon v. Brodie, 20th July 1773, 5 Bro. Supp. 587; Douglas v. Chalmers, 3d March 1762, ibid.; Henderson v. Dalrymple, 6th March 1776, Hailes's Dec. 695; Hamilton v. Lord A. Hamilton, 24th Jan. 1824, 2 S. & D. 640; Gordon v. Earl of Fife, 9th March 1827, 5 S. & D. 517, (but as to authority of that case, see post, p. 207); Gaywood v. M'Eand, 19th June 1828, 6 S. & D. 991; Morton, 4 W. & S. 379; E. of Cassillis, 9 S. & D. 663.—(*As to competency of parole proof.*) 3 Jurid. Sty. 12; Frank, 9th July 1793, Mor. 16822; Hepburn v. Lyall, 14th Dec. 1672, Mor. 12273; Hamilton v. Sinclair, 16th Dec. 1621, Mor. 16925; May v. Ross, 23d Feb. 1667, Mor. 12279; Pittillo v. Forrester, 22d Nov. 1671, Mor. 11,536; Johnstone v. Johnstone, Feb. 1688, Mor. 17063; Livingstone v. Nairne, 19th Feb. 1702, Mor. 12282; Arrot v. Garden, Feb. 1730, Mor. 12285; Durie and Doig v. Durie, 9th Feb. 1754, Mor. 16,938; Bank of Scotland v. Creditors of Telfer, 17th Feb. 1790, Mor. 16,909; Bell's Test. Deeds, p. 234; Swaney v. Bank of Scotland, 12th Dec. 1807, Fac. Coll.; Beveridge, 13th July 1822, 3 Murr. 10; M'Leod, 21st June 1824, 3 Murr. 432; M'Kellar, 28th May 1828, 4 Murr. 543.

Respondents Authorities.—(*As to parole proof.*) Bell's Test. Deeds,

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John Kedder appealed, and there was a cross appeal for costs; but the judgment was affirmed, on the grounds stated by the Lord Chancellor and Lord Brougham. The opinions of their Lordships will be found in the report of the next case,—Earl of Strathmore v. Sir J. D. Paul and others, No. 12, post, p. 189.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, in so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

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p. 104 to 121; Master, 4 T. R. 320, 2 H. Black. 141; Murchie, 1st July 1797, Mor. 1458; Hamilton, 1st Dec. 1824, 3 S. & D. 345; Thomson on Bills, 308; Innes, 10th March 1827, 5 S. & D. 559, and 2 W. & S. 537.

[*30th July* 1840.]

THOMAS EARL of STRATHMORE, Appellant.[1] (No. 12.)

[*Dr. Lushington — Sir W. Follett — A. M'Neill.*]

SIR JOHN DEAN PAUL and others, (John late Earl of Strathmore's Trustees,) Respondents.

[*Attorney General (Campbell)—Lord Advocate (Rutherfurd).*]

Writ — Vitiation — Erasure — Settlement. — A settlement of heritable estate was made by three relative deeds; viz. 1. a deed of entail; 2. a relative deed of nomination of heirs; and 3. a trust disposition for certain temporary purposes, under burden of which the other two deeds were granted. These deeds were all executed on the same day, and a duplicate of each deed was executed at the same time. There were numerous erasures and superinductions in the deeds and duplicates, but, with two immaterial exceptions, no erasure occurred in the same part of both the deed and duplicate, the deed being entire wherever the duplicate was erased, and vice versâ. No notice of the erasures was taken in the testing clauses of the deeds or duplicates, but in the testing clause of each deed special reference was made to the simultaneous execution of a duplicate, and vice versâ:—Held, in a reduction by the heir at law of the settlor, (affirming the judgment of the Court of Session,) that the deeds were, in the circumstances, unchallengeable, and formed together a valid and effectual settlement.

Costs.— The practice, in Scotland, of allowing costs out of an estate or other fund to a party who has attempted

[1] 15 D., B., & M., 449.

unsuccessfully to set aside an existing settlement thereof, observed upon, and the reconsideration of it strongly recommended to the Court.

1st Division.

Lords Ordinary Moncreiff and Cockburn.

Statement.

UPON the death of the late John Earl of Strathmore, his trustees, under a private settlement, entered into possession of his Scottish estates. The settlement was constituted by the following deeds: 1st. A deed of entail (under burden of the trust disposition in their favour,) bearing date December 15th, 1815, which disponed the barony and thanedom of Glammis and his Lordship's other Scottish estates in favour of himself and his issue in a certain order, "whom "failing, to any person or persons to be named by "him in any nomination or other writing to be exe- "cuted by him at any time of his life:" whom failing, to certain other heirs. This deed, besides enumerating the lands disponed, contained a general clause disponing "all other lands and heritages within Scotland "presently belonging or which shall happen to belong "to me at my death." (2.) A deed of nomination of heirs, dated the same day, and referring to the entail and the reserved power of nominating, whereby his Lordship excluded his brother, the Hon. Thomas Bowes, and John Lyon of Hetton House, and his brother Charles Lyon, from the succession, and appointed another series of heirs. This deed was in form a probative writ. (3.) A trust-disposition of his Lordship's estates, referring to the deeds of entail and nomination of heirs, and conveying the lands to James Farrer and others as trustees, who were directed to hold the lands for thirty years after his Lordship's death, and on certain contingencies for some time

longer, during which period they were to apply the accumulated rents in purchasing and entailing other lands.

On the same day when these three deeds were signed, the late Lord Strathmore also executed three duplicate deeds, purporting to be of the same tenor. The testing clause of each of the deeds in both sets referred to the cotemporaneous execution of a duplicate, in the same manner as in the following example, taken from the testing clause of one of the duplicate deeds of entail:— "In witness whereof I have subscribed this and the "forty preceding pages of stamped paper, written by "John Muir, apprentice to James Dundas, clerk to the "signet, together with a duplicate hereof, written by "James Sutherland, also apprentice to the said James "Dundas, at Edinburgh, the 15th day of December "1815, before these witnesses,—James Macalpine, clerk "to the said James Dundas, the said John Muir, writer "hereof, and William Wilson, clerk to the signet."

Shortly before his Lordship's death he executed a deed, adding another person to the number of his trustees. His Lordship died without lawful issue in 1820, and immediately after his death the trustees put one set of the deeds upon record, retaining the other set in their own custody. An action to reduce the whole deeds was raised by Thomas now Earl of Strathmore, the appellant, who pleaded chiefly, that as they rendered him destitute, though a peer of the realm, and as they provided for an excessive accumulation of rents, they were contra bonos mores and against sound policy. The Court sustained the defences, and assoilzied.[1] This judgment was affirmed on appeal.[2]

[1] February 16, 1830, 8 S. & D. 530.

[2] March 23, 1831.

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Afterwards his Lordship raised a new action of reduction, libelling that the deeds were "fabricated, "simulated, and devised, of false dates, not properly "tested, and want or are defective in the solemni- "ties required by law; and in particular, that the "said deeds, which are alleged to constitute the set- "tlement of the said John Bowes Lyon late Earl of "Strathmore, have been vitiated and altered in sub- "stantialibus after the alleged execution thereof; that "numerous important passages, as they originally "stood, have been erased and obliterated, and new "and different passages have been fabricated, and simu- "lately inserted in their place; that no fewer than 160 "such erasures and new insertions have been executed "on the alleged settlement; and that, in particular, "various of the lands conveyed, as they now appear "ex facie of the deeds, have been so simulately in- "serted on erasures, as well as passages affecting the "destination of heirs and the duration of the trust "thereby created."

A plea of res judicata being stated by the defenders (the respondents) in bar of this action, it was repelled by the Court.[1] The defenders then satisfied the production by lodging the recorded deeds and also the duplicate deeds in a sealed packet. The Lord Ordinary appointed defences on the merits, and "remitted "to Thomas Thomson, Esq., deputy clerk register, to "open the sealed packet now put into process by the "defenders, and that in presence of the parties or their "respective counsel or agents, and to report to the "Lord Ordinary as to the particular state and appear-

[1] May 24, 1833, 11 S., D., & B. 644.

" ance of the deeds therein contained, in so far as " regards erasures and interlineations, and thereafter " again to seal up the said packet, to be disposed of in " terms of any future order of the Lord Ordinary or " the Court." A report was returned under this order. In their defences the defenders stated that the deeds were in all respects genuine and authentic; and that no erasure occurred in substantialibus, so as to affect their validity, even if only one set of deeds had been executed, but still less were any erasures material where there were duplicate deeds; and they alleged, that although there might be erasures in the duplicate deeds as well as in the others, yet in no material part were there erasures of the same word or words in both of the corresponding deeds.

In preparing a record, and before revising his condescendence, the pursuer (appellant) moved for leave to make a farther inspection of the deeds, with the aid of persons of skill, whose names were stated in a notice served on the defenders. The defenders insisted that this motion could only be allowed under such precautions as should protect the deeds against all hazard from farther erasure by any party. The Lord Ordinary (Moncreiff) " allowed the pursuer, by his agent and any of his " counsel, with the assistance of any one of the other " persons mentioned in the notice, such person to be " specified in the intimation herein-after mentioned, to " inspect and examine the deeds under reduction, and " also the duplicates thereof at present sealed up, and " for that purpose remitted to Mr. Thomas Thomson, " deputy clerk register, to open the parcel as sealed up " by him, and at such time and place as he may " appoint, and in presence of the clerk of this process

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" to allow inspection and examination of the said deeds; " but expressly, that no experiment of any kind shall " be allowed to be made on the paper or the ink of " the said deeds; and that after such inspection and " examination the deeds shall be re-inclosed and sealed, " to await farther orders of the Lord Ordinary and the " Court; and appointed the pursuer to give intimation " to the defender's agents of the time and place " appointed for examination of the deeds, at least " forty-eight hours before it is to take place. But the " Lord Ordinary, in the present state of this process, " refused the motion of the pursuer to any greater or " wider extent."[1]

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[1] " *Note.*—In case the pursuer should be dissatisfied with this order, " it is necessary to explain the very peculiar circumstances of this cause.

" The pursuer insists for reduction of the deeds called for, merely on " the ground that they ' have been vitiated and altered in substantialibus " ' after the alleged execution thereof.' The principal deeds were in the " public register, and they have been transmitted to the clerk of the " process, under a warrant from the Court. After this was done, the " defenders put into process a sealed packet, which they stated contained " duplicates of the same deeds, executed but not recorded, and they " moved the Lord Ordinary to make some order by which the precise " state of both sets of deeds, in respect of vitiations or alterations, might " be ascertained, for the future guidance of the Court. The Lord Ordi- " nary made a remit to Mr. Thomson, the deputy clerk register, first, " with regard to the deeds in the sealed packet, and afterwards with " regard to the recorded deeds; and the first remit was specially to ' open " ' the sealed packet now put into process by the defenders, and that in " ' presence of the parties, or their respective counsel and agents,' and " ' to report to the Lord Ordinary as to the particular state and appear- " ' ance of the deeds therein contained, in so far as regards erasures and " ' interlineations,' &c., and thereafter to reseal the packets, to be dis- " posed of by the Lord Ordinary or the Court. These interlocutors " were acquiesced in, and the deeds having been very minutely examined, " Mr. Thomson made a full and very special report as to the state of " each deed.

" The parties then proceeded to prepare a record in the cause, and a " condescendence and answers have been lodged.

" In this state of the cause the pursuer makes a motion for a further " inspection of the deeds, before revising his condescendence. To this

An inspection of the deeds was then made by the pursuer's agent, aided by Mr. Lizars, engraver.

The appellant raised a supplementary reduction of the duplicate deeds, on the ground of their being erased in substantialibus, which action was conjoined with the first. As parties were still at issue respecting the number and extent of the erasures, a new remit was made of

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" there may be no objection, if it be regularly conducted and guarded. " But at first the pursuer refused to give any specification of the person " to whose inspection he wished the deeds to be laid open, and insisted " that the order should be made without limitation. The Lord Ordi- " nary having required him to specify the persons, beyond his counsel " and agent, whom he proposed to employ, the notice now produced " was given, and it was manifest, from the four last names in the list, that " the intention is to set, not one, but various engravers and other per- " sons, assumed to be scientific, to an inspection and sifting of these writs " at this stage of the process.

" It will be particularly observed, 1st, That these deeds have never yet " been seen by the Lord Ordinary or the Court.

" 2d, That the remit was made with the consent of both parties for " ascertaining the present state of the deeds.

" 3d, That the report was made by the person undoubtedly the very " best qualified, at least in the present instance, and that it was most " minute and particular.

" 4th, That although the inspection was ordered to be made in pre- " sence of the pursuer and his agent, it is not averred in the condescen- " dence lodged, that there are any erasures or vitiations other than those " reported.

" Nevertheless, it is possible that things may be omitted, and the pur- " suer might be entitled to a further inspection before revising, though " the Lord Ordinary must confess that he should not approve of a multi- " tude of counsel and agents being brought to such a business; and by " the above interlocutor the Lord Ordinary, though with hesitation, has " allowed him to take the assistance of one other person whom he may " suppose to have particular skill. But what he particularly objects to " is the attempt to bring such a number of such persons to such an " inspection at the present moment, whereby a conflict of opinions, " founded, as the Court well knows, very often on mere imagination, may " be raised as to the actual state of the deeds. He owns that he was not " without fear that experiments were contemplated. At any rate he has " thought it necessary to guard against it; and, on the whole, he thinks " the interlocutor gives the pursuer the utmost latitude which he can " possibly expect in the present state of the cause. What may be thought " necessary afterwards is another point."

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consent by the Lord Ordinary (Cockburn) to Mr. Cosmo Innes, advocate, to inspect the deeds, and "report on "the whole erasures." He drew up a report, from which it appeared that in the recorded deed of entail there were forty-two entire words, in various places, written on erasures; and sixty-two letters or syllables, also in various places, written on erasures. Among all these the only erasure and superinduction which also occurred in the duplicate deed of entail was in a part of the name of a parcel of lands called Younies, composing a portion of the barony of Glammis. The description of the whole lands was contained in a procuratory of resignation, and in both duplicate deeds of entail the words "all "and whole the lands, ancient barony, lordship, and "thanedom of Glammis" were free of erasure. These words were immediately succeeded by the following clause: "comprehending the mains and town of Glam- "mis, the town and lands of Balnamoon, Myreton, Easter "and Wester Younies, Arnafoul," &c. In the recorded entail the letters Yo in Younies were written on an erasure; in the unrecorded duplicate the letters You were written on an erasure; and the same partial erasure also occurred in the trust disposition and its duplicate.

The Lord Ordinary (Cockburn) "approved of Mr. "Innes's report, against which no objections have been "lodged; sustained the defences, assoilzied the defen- "ders, and decerned; but found the pursuer entitled "to his expenses incurred to this date out of the trust "funds."[1]

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[1] "*Note.*—The remit to Mr. Innes was made before answer, and of "consent, with an order to him 'to report on the whole erasures,' and "on the parties 'to print the deeds in such a form as to show the whole "'erasures therein.' Mr. Innes reported, and the deeds were so printed;

Both parties reclaimed, the pursuer on the merits, and the defenders as to the award of expenses.

" and not only have no objections been lodged, but, until the debate had " begun, no proposal or expression of any desire to object was hinted. " In these circumstances the Lord Ordinary holds the report, which is " by a person of skill in his own department, to be conclusive; and he " does so the more readily, 1st, Because a final reference to such a person " was almost a matter of necessity in the circumstances of the case, where " the erasures are said to be about 460, and where the judges of each of " these were certainly to be five, and might be thirteen, each of whom, " if there was to be no final report, would have been obliged to form his " separate opinion of each erasure and alleged erasure. 2dly, Because " his clear impression, at the time of making the remit, was, that it " was understood that the report was to be held on all sides as fixing the " facts.

" Upon the merits, the case is very peculiar in two particulars:—1st, " In the unusual number of erasures. 2d, In the means which the " granter has afforded of enabling the law to dispose of these by an " unusual number of relative and inseparably connected deeds.

" The erasures being so numerous, and the pursuer professing to make " a point of almost every one of them, it is impossible for the Lord " Ordinary to state his opinion of them in detail. He can only say, in " general, that the conclusions he has come to depend on the following " views:—

" 1st. That a very great number, nearly the whole, of the passages ' objected to are plainly immaterial, consisting of words, syllables, or " letters which have obviously been written on erasures, merely in order " to correct palpable clerical errors, a mis-spelling, or such other acci- " dents, and the entire omission of which parts of the deeds would create " no doubt of the granter's meaning, or of its due expression, especially " considering that some of them occur in parts of the deed which are " merely narrative, or which only describe the contents of the other deeds, " or in which the necessity of absolute accuracy is superseded by the use " of general terms or directions.

" 2d. That though there be passages of more importance, which it is " possible may, in given circumstances, hereafter supersede or otherwise " affect detached portions of some or of all of these deeds, at the instance " of the pursuer, or of any other party entitled to found on these defects, " there is none of them which so vitiates any of the deeds in substan- " tialibus, as that reduction is the necessary legal consequence, even " though each particular deed challenged were to be looked at by " itself.

" 3d. But none of these deeds can be so looked at, because the trust, " the entail, and the nomination of heirs form one general settlement; " and having been executed in duplicate, all in one day, and all bearing " express reference to each other, it is competent, when each erasure is ' excepted to, to throw any explanatory light upon it that can be ob-

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Judgment of Court, 1st Feb. 1837.

The Court pronounced this interlocutor:—"1st February 1837.—Adhere to the interlocutor reclaimed against, and refuse the desire of both reclaiming notes; and find the pursuer entitled to additional expenses, to be paid out of the trust fund."

The Earl of Strathmore appealed.

Appellant.—If a deed contain words and lines evidently superinduced on erased paper, parchment, or vellum, more especially if the erasures be executed in such a manner that what was originally written cannot be read, such a document is ex facie void. The legal presumption is, that it has been altered after subscrip-

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"tained from these other writings, signed by the granter, in relation to "that very passage, as to every passage of the deed challenged; and that "this reference from the one to the other is peculiarly competent and "peculiarly conclusive as to the general averment made by the pursuer "in the record, that important words have been obliterated, and different "words inserted after subscription. Of these there has been no proof "beyond what the deeds themselves afford; and when the whole are "taken into view, they negative the assertion.

"4th. That even though effect were given to the whole erasures, to "the extent of holding each erased passage as not written at all, this "would not render the settlement either void or inoperative, and would "at least leave enough to exclude the pursuer from demanding that "total reduction which he now seeks, and upon which all his other "conclusions depend.

"It is needless to refer to cases, because the abstract rules are clear; "and almost the only general result of the decisions is, that in their "application every case depends mainly on its peculiar circumstances. "The Lord Ordinary may only observe, that there is no erasure here, "than which one equally or more important cannot be shown to have "been disregarded in a case at least as strong, and this even when there "was no aid to be got from any collateral deed.

"But, although the pursuer be wrong, the Lord Ordinary gives him "his costs hitherto incurred, because he was warranted, or rather tempted, "to try the question, by what appeared on the very face of the instru-"ments. He had better not speculate, however, on this indulgence being "continued for ever."

tion, and consequently that it is not the deed of the nominal party maker of it. This rule is founded in justice, because no man can be presumed in a matter of importance to sign a mutilated and imperfect written document, especially when, by the erasures, it is rendered impossible to know what the deed truly was that the nominal maker intended to execute. There is a known mode established in the law and practice of Scotland, by which this presumption against a deed may be obviated, viz. that in the testing clause, or elsewhere, it shall be stated in the deed that the words superinduced on erasures (specially described by page and line) were so superinduced before subscription. It is thereby proved that the maker of the deed was aware or was made aware of the defect, and that he was subscribing a document containing imperfections, to which his attention had been specially directed, and which he had specially sanctioned.

The defect is not obviated by making two alleged copies, if each copy contain numerous words and lines superinduced upon erasure, because that is not the remedy, established by law and practice, to cure mistakes committed in transcribing a deed from the draft or scroll; and besides it does not obviate the objection, that where erasures have been dexterously made, the maker of the deed was not aware that he was signing an imperfect document. Thus it does not show the date at which the erasures were made, i. e. that they were made before subscription. It does not satisfy the established rule, that a land estate cannot be alienated, or an heir disappointed of his inheritance, without a regular written deed. Here the proprietor has not by any correct instrument conveyed his estate, but two invalid

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deeds are founded on, out of which it is proposed that the Court, under the sanction of this House, shall manufacture a valid and regular deed. Neither duplicate in this case made the testator aware of the kind of documents he was subscribing, or shows that he consciously, sciens et prudens, signed documents written, in hundreds of instances, on paper erased with singular dexterity, so as to conceal the original writing. Farther, instruments containing a multiplicity of erasures cannot be received as probative writings. Hitherto this principle has been adopted in the practice of the law of Scotland, and ought not to be departed from. Deeds labouring under such a defect ought to be regarded as ex facie tainted, and therefore annulled by fraud.

The words and lines superinduced on erasures occur in substantialibus of the deeds in question. This is apparent from the fact, that vitiations exist in the trust deed, in the purposes of and endurance of the trust, the parties in favour of whom the trust was granted, and in the lands conveyed. They occur in the entail, in the subjects entailed, the succession of heirs, &c. It is always to be recollected, that an error in substantialibus in either of these deeds must annul the whole settlement. The onus probandi is incumbent on the parties claiming the inheritance of the appellant, to show that they hold a deed not containing erasures in substantialibus; but it is impossible for them to show this, while every deed they hold contains words and lines superinduced. It is not enough to refer to alleged duplicates, and to admit the fact with regard to the trust deed, but to found on another trust deed of similar import, and maintain that, although a word may be superinduced on erasure in the one, the same word is

Appellant's Argument.

not written on erased paper in the other. It is incumbent on the respondents, who claim the appellant's inheritance, to produce a correct deed conveying it. If the deed produced be not a probative writing, it cannot by its testimony convert into a probative writing another document equally defective with itself.

The respondents have maintained, that even if the words superinduced on erasures be held pro non scriptis, enough will remain to disinherit the heir; to this it is answered, that nothing can remain to disinherit the heir in a deed which, as has already been shown, is improbative; it is not yet shown that the erasures were made before the deeds were signed, or that the grantor of them was aware of their existence, concealed, as in this case they are, by superinductions dexterously executed.[1]

Respondents Argument.

Respondents.—It is admitted that the deeds in question appear to have undergone clerical correction or erasure in a variety of particulars. It may also be conceded, that much of the legal doctrine regarding vitiations in essential parts of a written instrument, contended for by the appellant, may be supported by authority. But then, in applying that doctrine, the nature and effect of the particular erasures must be carefully looked to.

In these circumstances there are two sufficient answers

[1] *Appellant's Authorities.* — Pittillo, 22d Nov. 1671, Mor. 11536; Brown, 20th June 1701, Mor. 11541; Reid, 24th June 1834, 12 S., D., & B., 781; 3 Ersk. 2. 2. and 20; Bank. 1. 11. 34; Balfour, tit. 1. c. 170; Bell on Testing Deeds, 104. 116; Innes, 10th March 1827, affirmed, 4 W. & S. 379; Grant, 12th May 1830, 8 S. & D. 734; Howden, 10th July 1835, 13 S., D., & B., 1097; Sharpe, 18th April 1835, 1 Sh. & M'L. 619; Davidson, 14th Nov. 1827, 6 S. & D. 8.

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to the case attempted to be made by the appellant. In the first place, the respondents contend that, as the erasures specified in the report of Mr. Innes do not occur in substantialibus of any of the deeds under reduction, and give rise to no doubt as to the true meaning or legal import of any of the provisions, they do not vitiate or invalidate the deeds; for the different deeds are truly parts of one general settlement, executed by the late Earl of Strathmore for the purpose of excluding the appellant from the succession to his Scotch estates; and hence the appellant has no interest to found on erasures in the subsidiary clauses of the deeds, seeing that he is effectually excluded by the leading provisions.

But, secondly, all erasures, whether in important or unimportant parts of a deed, may be remedied by a reference to them in the testing clause; and the testing clauses in each set of the deeds under reduction expressly bear that they were executed in duplicate at the same time, and in presence of the same witnesses. The objections to the erasures, therefore, are completely obviated, the deeds themselves affording conclusive evidence, that none of the erasures were made after the signature of the late Lord Strathmore was adhibited. The effect of the execution of the deeds in duplicate, in particular, is to afford a check still more certain even than the mode usually relied on, of noticing the erasures in the testing clause. An examination of the duplicate shows that none of the material erasures are contained in both sets of deeds. The erasure of three letters in the name of one of the parcels, "Younies," can afford no plea for setting aside the deed; and cannot even

affect the conveyance of a part of the lands, the whole being comprehended and conveyed under the general disposition of the barony.[1]

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Judgment deferred.

Parties having been called on in this and the two preceding cases, the following opinions were delivered:—

LORD BROUGHAM: — In dealing with these cases, which, although differing from each other in some particulars, yet all turn mainly on the same principles, it will not be necessary to enter so minutely into several of the points made in each, both below and at your Lordships bar, as it would have been had I been obliged to take the course of recommending your Lordships to alter the judgments appealed from. Moreover, in addressing myself to the grounds of affirmance, it will be, for the most part, my endeavour to consider only the more important ones, and those on which doubts have been raised by the argument, rather than those which have not been broken in upon. The first two cases (Hoggan

Ld. Brougham's Speech.

[1] *Respondents Authorities.*—Stair, 4. 42. 19.; Gaywood v. M'Eand, 19th June 1828, 6 S. & D. 991; Trustees of E. of Cassillis v. Kennedy, 2d June 1831, 9 S., D., & B., 663; Morrison v. Cauvin's Trustees, 29th June 1829, 7 S. & D. 810; Wright v. M'Leod, 8th Feb. 1672, Mor. 11540; Lyon v. E. of Aboyne, 21st Dec. 1709, Mor. 11544; Cumming v. Presbytery of Aberdeen, 18th April 1721, as reversed on appeal, Robertson's Appeal Cases, p. 364; Maxwell v. Houston, 30th April 1725; ibid. 539; Spottiswoode v. Creditors of Prestongrange, 17th June 1741, Kilk. & Mor. 16811; E. of Traquair v. Henderson, 26th June 1802, F. C.; Kemps v. Ferguson, 2d March 1802, F. C.; Abernethie v. Forbes, 16th Jan. 1835, F. C.; Adam v. Drummond, 12th June 1810, F. C.; as to effect of deeds in duplicate, Erak. 3. 2. 20; Boswell v. Boswell, 20th Feb. 1708, Mor. 17025; Cubison v. Cubison, 3d July 1716, Mor. 16988.

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v. Ranken and Kedder v. Reid and others) both arise upon the validity of instruments as affected by erasures; —in the one an instrument of sasine, in the other a disposition. The great importance of the decision in the former case, as affecting the title to many estates, caused your Lordships to have the point re-argued. The practice of conveyancers, however, having been found to make them very generally take titles subject to this objection, an act was passed in 1836, the 6 & 7 Will. 4. c. 33., curing the defect in all cases on which no suit was pending before a certain time, and also curing it prospectively. The time, I think, was the 12th of May 1835, and consequently that act did not at all apply to either of these cases. The question is, therefore, now stript of the importance which formerly belonged to it; and the decision below is only material as far as it may be so in its consequences to the parties in the cause, and also as it may possibly connect itself with some general principles of the law.

The appellant (in the first case), as the widow of Alexander Smith, the person infeft upon the instrument of sasine in question, claimed her terce on the lands of which he was so infeft. Her claim was preferred in a process of ranking and sale, brought by the creditors of Alexander Smith the husband's heir-at-law, and they objected to the infeftment of the husband (which was necessary to support the widow's title) on the ground of the word "three" in the year of our Lord being written on an erasure, while the word "third" in the year of the king's reign was written without any erasure. A great majority of the learned judges have held this to be an erasure in substantialibus, and that the fact of all

appearing right in the register of sasines can make no difference, nor cure the defect.

The case is confessedly one encumbered with considerable difficulties; but, on the whole, it does not appear to me that your Lordships can safely be advised to reverse this decision,—hardly as it presses upon the appellant, and open as its groundwork is to considerable observation. None of the cases, which have been relied on against the decision can be said, when examined, to be broken in upon by it, and therefore none of them will be affected by the present judgment. Those cases which come nearest this case are Cassillis v. Kennedy, 2d June 1831[1], and Gaywood v. M'Eand, 19th June 1828[2],—which were cases of erasure, not in sasines, but in dispositions,—and Gordon v. the Earl of Fife, 9th March 1827.[3]

In the first of these cases the letter "x" in the word six (the number of pages) had been written on an erasure; and the deed consisted of seven pages, so that it was contended that the statutory requisition had not been complied with, because the word "six" was to be taken as not written at all. But the decision, first of the Lord Ordinary, and afterwards of the Court, turned upon this, that the reference in a marginal note showed the number to have been six when the deed was executed, and that therefore the letters "si," written without erasure, could only mean six, and the erasure was immaterial.

The circumstance of this being a deed on which sasine and possession had followed above forty years

[1] 9 S., D., & B., 663.
[2] 6 S. & D. 991.
[3] 5 S. & D. 517.

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before, was also expressly stated in the Lord Ordinary's reasons.

It was a similar objection in Gaywood v. M'Eand; the last letters, "ve," in "twelve" were written on an erasure. It was either a blot or an erasure. This was a case free from all doubt; for these two letters, as the Court, particularly Lord Gillies, observed, were so little necessary that the word would have sufficiently expressed the number of pages without them.

The case of Gordon v. the Earl of Fife [1] was, like the Coblehouse case [2], a question upon a freehold qualification; and the objection taken was, that the instrument of sasine, after stating the date of infeftment, the 7th day of May 1825, and the 8th year of the reign of king George the 4th, proceeded to set forth that sasine was given upon a charter, "per quam cartam dict. S. D. "N. rex dedit," &c.; that is to say, a charter of our said sovereign lord the king, — dicti supremi domini regis, or George the 4th before mentioned; whereas the party (Gordon) claimed to be enrolled on a charter granted by and in the reign of king George the 3d, which he produced. The question there arose, not on any alleged vitiation on account of an erasure, but on the identity of the two charters;—the one referred to in the instrument of sasine, and the one produced by the claimant. And besides an argument, to which the Court did not listen, raised on the grammatical construction of the words "per quam cartam," &c., viz. that "said" (dict.) applied to the last antecedent, and not to the sovereign, it was contended that enough appeared on the face of the instrument to identify the

[1] 5 S. & D. 517. [2] Rose Innes v. E. of Fife, 5 S. & D. 525.

charter, and to show that there were not two charters, —one of George the 4th and another of George the 3d, —and to prove that the word "dict." was a clerical error, and not material. I cannot regard this as a decision at all applicable to a case where there are two dates, one the year of God and the other the king's reign; and I must fairly add, that I do not go very willingly, or indeed very easily, along with that decision; and that the argument delivered by the Lord President, and in which Lords Gillies, Alloway, Eldin, and Corehouse concurred, would have satisfied my mind had I been to join in the judgment.

But the case of Kedder v. Reid and others seems to be free from all or almost all of the difficulties which are found in Hoggan v. Ranken. Here, although the instrument is a disposition, and consequently may be said to be less under the dominion of strict rules than the actus legitimus of sasine, yet the materiality of the erasure is quite manifest. It is in the name of the grantee, which has been changed from "James" into "John" throughout the deed by thirteen erasures, that is, by an alteration as often as the word occurred; the first letter, "J" only being left, and the grantee being described in one place as "John the younger;" John not being the younger, but James being the younger. They were both, it appears, illegitimate children by different mothers. The grantor's name and the word "younger" being found, there arises a presumption that he must have intended to give it to James; but that either he having changed his mind (for that is one question), or other persons having changed the deed, the name was altered into John, letting the words "the

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"younger" remain, which was not very sensible, there being no John the elder.

There being no doubt whatever that this is an erasure in substantialibus, the only real doubt is raised upon the testing clause, which contains a reference without any erasure to the grantee as "the said John Kedder my "son." This, it is contended, might supply the place of a notice, that the erasure in the body of the deed had been made before execution. Certainly in no other way could it operate, for clearly no title to real estate could be constituted by this clause standing alone. It would, as it appears to me, however be most perilous to suffer any such effect to be given to this testing clause.

The whole argument, as to the effect of the testing clause, rests upon the supposition that the clause is filled up at the time of execution; but this is contrary to the usual practice. Certainly nothing like even a formal practice of filling up at the time has ever been pretended. Now, if it was filled up afterwards, the alteration may have been made after execution, and the clause filled up according to the alteration; nor is it any answer to this to say, that so the testing clause may be filled up to suit an erasure or alteration, when it takes notice of such erasure or alteration in the usual way; because, although this is certainly true, yet on that very account the practice of postponing the filling up is greatly to be discountenanced; and where it is necessary after execution to take notice in the testing clause of an erasure or alteration, such testing clause should not be filled up, unless accompanied with some act by the maker of the instrument evidencing that he was consusant of the notice in the testing clause. The whole

force and effect of an erasure being mentioned in the testing clause is derived from the supposition that the clause speaks truth when it asserts the making of these erasures before the execution, and any suspicious circumstances on the face of the clause would destroy the credit thus given to it. In this case it is one circumstance of suspicion that the words "writer hereof," the last words of the clause, are written over part of the testator's signature, indicating that in this instance, at least, the clause was written after the execution of the deed. Every consideration shows abundantly that the admission of a notice of erasures in the testing clause without more as proof that the erasures existed before the execution, and were known to the maker of the instrument, is liable to much objection, and exposes the right of parties to great hazard.

But the course now referred to having been established in practice, and recognized by the decisions, it only remains carefully to prevent it from being extended, and to keep the rules respecting it, already all too loose, from being in any particular relaxed. It would be a considerable relaxation of these rules to regard the words, "in favour of the said John Kedder "my son," as equivalent to a statement that the word "John" had been written throughout the deed on an erasure. It is not necessary certainly that any exact form of words should be used in making a reference to erasures, and it may be admitted that if there is in the testing clause a statement which amounts to the same thing as asserting the existence of the erasures, it is sufficient. But then it must be an assertion of all the erasures, that is, all the material ones, having been made

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and written over before execution. Now, here, this can only be said to be done inferentially by the deed being referred to as "in favour of John Kedder;" the reference by the word "said" is plainly not effectual; if he had been named once, this reference might have satisfied, although the deed would still have had twelve erasures in the very material part of the grantee's name. Then, can we hold the inference arising from the words "in favour" to be sufficient? This we cannot do, unless we hold that a person saying in the testing clause that he has made a deed in favour of A. is equivalent to saying, "in all the instances in which B.'s name is "mentioned in the deed and struck out, and A.'s name "written over it, this alteration was made before exe-"cution;" and even this would not be enough, because there must be a specification of the very erasures in number and position, or such a reference as amounts to a specification.

A reference to another writing, in which the words referred to are not written on erasures, is a very different thing from the present case (Kedder v. Reid and others); and such a reference might be so made as to supply exactly the want here complained of, namely the specification of the alterations; nay, to supply it with more certainty and greater particularity than the usual notice in testing clauses. But such a reference as the testing clause contains in the present case is entirely different, and could not be held sufficient to authenticate the instrument without the most dangerous consequences.

It must further be remarked, that even if the clause were admitted to have been written before the execu-

tion, it would by no means prove the maker of the deed to have been aware of the erasures and superinduced writing.

And with respect to the permission contended for of examining the attesting witnesses to the fact when the alterations were made and the clause written, (which the Lord Ordinary was induced to do,) this was, I think, justly refused by the Court, on the ground, I presume, that such a course would be inconsistent with the nature of probative writings.

Having adverted to the possibility of supplying an omission in the testing clause of reference to erasures, by reference to another writing, it may be as well here to state that this is the distinguishing peculiarity in the case of the Earl of Strathmore v. Sir J. D. Paul and others, where a conveyance of the estates conveyed in that case is sought to be reduced on account of erasures. The deeds constituting the conveyances in question are, as has been justly observed both below and here, prepared in a slovenly manner, the erasures being extremely numerous; but they have been supported mainly upon two grounds: first, that the vitiations were not in substantialibus, the words or parts of words written on erasures not being such as to make the alterations material; secondly, that if they were, the testing clauses in the different sets of deeds refer to duplicates executed of the same dates. The Court below proceeds upon both these grounds, and either substantiated would certainly be sufficient to support the conveyance. As however some of the erasures are in the parcels, the names of the premises settled, and are otherwise so extensive as to make it possible that words of importance have been erased and others superinduced, it rather appears that

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a necessity arises of resorting to the second ground, viz. the reference to the duplicates.

The testing clause is in these words: — "In witness "whereof I have subscribed this and the forty pre- "ceding pages of stamped paper written by John "Muir, apprentice to James Dundas, clerk to the "signet, together with a duplicate hereof written by "James Sutherland, also apprentice to the said James "Dundas, at Edinburgh, the 15th day of December "1815, before these witnesses, James Macalpin, clerk "to the said James Dundas, the said John Muir, writer "hereof, and William Wilson, clerk to the signet." This appears to be very material. The two sets of deeds, when examined and compared, are found to tally exactly, but in this way,—that whatever appears written on an erasure in the one is uniformly in the other written clear and without erasure, unless in two instances, of which one is confessedly immaterial, (the words "a will" in the narrative that the maker of the deed had made a will of the English estates,) and the other, if material in itself, is rendered of no importance by the other words in the deed operating to convey the parcels. Thus supposing the word "Younies" in which there is an alteration of two letters, struck out of the deed altogether, still it would appear to be supplied by other parts of the conveyance where a similar word occurs. The effect then of the statement in the testing clause is exactly to assert that in each case the maker of the deed did on the 15th of December 1815 execute a duplicate, that is, another deed, in precisely the same words. It is an assertion that he had read or was otherwise conusant of both, and knew how they stood in a comparison of the one with the other. It is a reference

from the one to the other, and is equivalent to a statement that the maker knew of the one being so corrected as to tally with the other, or, that as often as any erasure occurred in the one, the words superinduced were to be found written without erasure in the other. It is therefore the same thing as if in any one deed having erasures, the assertion had been made that there were erasures which would appear in a separate list authenticated by the signature of the maker, and setting forth the words or letters which had been struck out and the words or letters which had been superinduced in each instance, with the page, line, or part of the line where each alteration had been made. Indeed it is equivalent to somewhat more. It seems equivalent to an execution without erasure of every portion of the deed, although on separate papers or parchments; nor could this identity of the two sets of deeds have been effected after the execution by any contrivance, for the portions written without erasure in the one operate as an effectual check upon the filling up of the corresponding passages written on erasures in the other. This is therefore an entirely different case from the one which is now more immediately under the consideration of your Lordships (Kedder v. Reid and others), and the two judgments which have been given below in the two cases may well stand together.

It is impossible to discuss this very important subject of vitiation of instruments, without observing how unfortunate it is that the course of decisions, now too long established to be broken in upon otherwise than by the legislature, should have ever authorized the distinction taken between vitiation and essential vitiation, without satisfactorily fixing the mode of referring to erasures,

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while the law, as an important part of its provisions, recognizes probative writings. When an instrument is objected to on this ground, the question of materiality is raised, and if the vitiation is found material, another question becomes inevitable. Does the testing clause or other notice of the alteration sufficiently cure the defect? The former question is unavoidably in many cases of extremely difficult solution, and must be so from the very nature of the case, especially when the erased words do not appear. The latter question is also often beset with great difficulty. But when we add the practice so generally adopted of filling up the testing clause after the execution, nay at a considerable interval of time, (in one case, Blair v. Galloway [1], the lapse of thirty-two years was not held too long,) nothing can be more clear than that a door is opened to the grossest frauds being successfully and safely practised; indeed, to the extent of a party being made to have executed one instrument, when he in truth executed another,—being made to have given, as in one of the cases at the bar, his estate to John, when, for aught that appears, he intended giving it, and thought he had given it, to James. If, instead of the rule of law being as I have stated it, and as all are agreed it is, the rule were, to consider every vitiation as material, and to require that every alteration should be particularized in the testing clause, and that the testing clause should either be filled up at the time of the execution, or authenticated by the subscription of the maker if written afterwards, his name being subscribed to the last words of the instrument itself, the

[1] 6 S. & D. 51.

dangers would be avoided to which I have adverted, and which have frequently been taken notice of by judges as well as by writers on conveyancing, and which are quite well known to practical conveyancers.

In order to finish what it may be necessary to state respecting the case of the Earl of Strathmore v. Sir J. D. Paul and others, (for I omit some parts of the case, which are less essential in themselves, and some parts of importance upon which less doubt has been raised in argument,) it may be observed that in that case there is a reduction of the whole settlement. The appellant has brought his action with that view alone; he does not complain as heir at law, that, by a conveyance in which there are material vitiations, certain parcels of the estates have been carried away from him,—those parcels which are described by words written over erasures; but he demands to have the whole settlement reduced on account of erasures which he contends are fatal to it altogether. Now, independently altogether of the argument derived from the testing clause, and its reference to the execution in duplicate, and supposing the erasures were in no way whatever cured, it is clear that there are not any which go to this extent. The objection to those affecting the destination has been sufficiently answered; and those which appear to be most important only affect the parcels in one or two instances, as that of Younies, to which reference has been already made, and the erasure on which the words between "sheriffdom" and "of Eassie" are superinduced. The former, it will be remembered, is one of the only two examples of there being the same erasures in the duplicates, and consequently not falling within the scope of the argument drawn from thence; and of

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this it may be observed, that even if the two letters written upon the erasure be admitted to be material, and not to be supplied by the other parts of the conveyance where a similar word occurs, still there are words without any erasure conveying the barony; and Younies, or whatever it may be, is described as comprehended within that barony; consequently it will pass under the general words, and the only question that can arise on this would be one of parcel or no parcel. But suppose it were otherwise, and that in consequence of the erasure this particular parcel did not pass, nothing hence arising could touch the validity of the deed in its other parts. The appellant may, upon the supposition made, have a title to succeed the maker of the deed in the parcel thus admitted not to be validly conveyed away from him, and he may prevail in obtaining that parcel; but in this action he cannot succeed, unless he shows such a vitiation as entitles him to reduce the settlement altogether. He can only by the supposition and admission now made, have the vitiated part struck out of the deed, but he cannot set the deed aside. In the same way as to the erasure between the word "sheriffdom" and before the words "of Eassie," on which I recollect suggesting during the argument, that we could not tell what may formerly have been written on that space, that e. g. the words erased may possibly have been "save and except the "lands of Eassie," which, instead of working the heir at law's disherison, as the clause now standing there does, would expressly prevent his disherison. The utmost effect of supposing that this material vitiation was not cured by the reference in the testing clause or otherwise, would be that quoad the lands of Eassie the

settlement is inoperative, and that to these lands the appellant has a right to succeed in so far at least as that portion of the conveyance is concerned. I wish it to be clearly understood, that I am applying my observation only so far as this particular correction is in question.

The course which it appears to me your Lordships should be advised to take in these three cases is this:— In Hoggan v. Ranken, to affirm the judgment of the Court below, not only to the effect that the sasine of the husband in the lands of Monygryle and Pointfoot was invalid (to which the question of the erasure in the instrument of sasine is confined,) but also that he had not a valid sasine in the dominium utile of the lands of Knocksting. There were no costs given below, most properly, and none certainly ought to be given here.

In Kedder v. Reid and others to affirm; but the interlocutor of the Court appealed from altered, so far as it alters the interlocutor of the Lord Ordinary, which had allowed the pursuers (respondents) their costs, and found no costs due; and there could be no cross appeal on costs.[1] If John Kedder has been all these years in possession, he should pay the costs of this appeal.

In the Earl of Strathmore v. Sir J. D. Paul and others, I would move your Lordships to affirm the interlocutor appealed from which assoilzies the defenders, but give the costs of the pursuer out of the estate, as was done both below and here in the former action for reducing the late Earl's settlement on other grounds.

Complaint is made by the appellant of the interlocutor of the 11th of March 1837, as not allowing his costs

[1] Clyne's Trustees v. Dunnet and others, 25th Feb. 1839, M'Le. & Robin. 28.

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in a manner sufficient to work out the intention of the Court in its former interlocutor[1]; but your Lordships cannot, I think, be advised to make any alteration in that.

Earl of Devon's Speech.

Earl of Devon.—My Lords. As I attended the hearing of the first of these cases (Hoggan v. Ranken), it may be right that I should state that I entirely concur in the view taken by my noble and learned friend. Upon the argument of the case, and with reference to all that appears in the text books and decided cases with regard to the question of vitiation, I came to the conclusion that the law was such as the Court of Session have declared it to be; and a re-examination of those cases, with a reference to the books again upon the present occasion, has certainly led me to think that that was a correct opinion.

Unquestionably the case of Hoggan v. Ranken showed, perhaps as much as any case can show, the hardship with which the doctrine of the Scotch law might occasionally press upon individuals; but we have nothing to do but to see what is the strict rule of law. I therefore concur in the proposal to affirm the judgment appealed from. I was not present at the argument in the two other cases.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, not having been in the House when the first of these three cases was argued at your Lordships bar, I am not in a situation to offer any opinion upon it. But having heard the two latter cases, I fully and entirely concur in what my

[1] The ground of appeal as to costs was, that the costs as taxed and decerned for "were under the due and actual amount."

noble and learned friend (Lord Brougham) has stated. Indeed, upon looking back to my own notes I find that in both these cases I had made a note at the time leading to the conclusion which my noble and learned friend has now stated to your Lordships.

With regard to the case of Kedder v. Reid and others two points were made:—first, whether upon the face of the instrument itself it was not invalid? Secondly, whether any defect apparent upon the face of the instrument itself could be made good by an examination of the attesting witnesses? The Lord Ordinary (Moncreiff) did not decide the first. He expressed an opinion that that was a matter of considerable doubt; but he thought the parties ought to have liberty to examine the attesting witnesses to the deed, to remove the irregularity apparent upon the face of the instrument.

Now it appears to me that to admit of this would be entirely destructive of the nature of a probative instrument, because it assumes that upon the face of the instrument it is not good. There can be no use in examining witnesses to sustain that which is unimpeachable upon the face of it. On the other hand, if it is not good, then it is not a probative instrument, and does not carry that evidence of its being an authentic document in conformity to the law of Scotland, which that law requires. The opinion of the Lord Ordinary upon the point now mentioned was not sanctioned by the Court, the opinion of the Court being that that was not a proceeding which ought to be adopted.

Then, upon the face of the instrument itself it appears to me perfectly clear that it is an instrument which cannot stand. A great part of the argument at the

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bar proceeded on an endeavour to find in other parts of the instrument words which would be sufficient to justify the omission of the word "John," on the ground that it was written on an erasure; but the objection is not that there is the word "John" written on an erasure, where you cannot discern what the original word was; the instrument has a very different aspect, for from it it appears not only that "John" is written upon an erasure, but that the word "James" remains visible, although the word "John" is written over it; and there is, in addition to this, the circumstance, to which my noble and learned friend adverted, that in one instance it is "John junior," whereas there is no John junior, James being the only person to whom the word "junior" could refer, the author of the deed himself having borne the name of James.

It appears then that the word originally written throughout the deed was "James," and that that word has been scratched out wherever it occurred, and the word "John" written on the erasure. Now the vitiation thence arising might have been cured if the testing clause had taken notice of this erasure, and the witnesses had testified that the deed was executed after the erasures had been made and the name of "John" substituted. The word James was undoubtedly in the deed originally; the question is, whether it still remained in the deed, or whether John was the word in the deed at the time of the execution? Now the testing clause takes no notice at all of the alteration, but it does that which is very unusual,—it attests the fact of execution, adding the words "in favour of my son John." The addition of these words, however, does not go at all to prove that when the deed was executed the word

"John," was substituted for "James." It may possibly be supposed that the word "James" stood part of the deed at the time when the author of the deed executed it, and either that it was discovered to be a mistake, or that his intention was altered previously to the attestation, and that then this clumsy contrivance was resorted to for the purpose of making the deed answer the purpose by substituting one son for another,—John instead of James. Then, at the time of the attestation, the intention, no doubt, would be to give the estate to John; but the question is not what the intention was, but how the deed stood at the time it was executed. Now if the party had intended that these alterations should take place, and if the witnesses had intended to pledge their credit to the fact that these alterations had taken place before the author of the deed affixed his name to it, they might have expressed that; but that not having been done, and it appearing to me to be an alteration in a most important part, namely in the name of the party who is to take the benefit of it, and there being nothing by which your Lordships can be satisfied that the alteration took place at a time anterior to the execution of the deed, I am of opinion that it cannot be made valid by the aid of parole testimony.

My Lords. The case of the Earl of Strathmore v. Sir J. D. Paul and others appears to me to be clear of any of those objections; and singular it is, that considering how numerous the alterations in that case are, every one appears to carry its cure along with it. In the first place, it would be difficult to make out that any one of them is so material as to invalidate the instrument. But if any question arose about that, you always find another instrument containing the word erased. Wherever there

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is an alteration which might have operated against the deed if it had stood by itself, the other instrument contains the word not upon an erasure, and proves, therefore, that the deed in which the erasures are found was the same in form at the time the party executed it. It was upon these two grounds that the validity of the deed was maintained at the bar: first, that the alterations were not material; and, secondly, that if they were, there was another instrument referred to in the testing clause, which showed that the alterations in question formed part of the instrument at the time it was executed.

The result therefore is, that it is wholly free from the objections which arose in Kedder v. Reid and others. I therefore concur in the proposition which my noble and learned friend has made, that your Lordships should affirm the interlocutors appealed from.

There is some difficulty as to what ought to be the course with regard to costs in the Earl of Strathmore v. Sir J. D. Paul and others. But your Lordships having taken the course which has been referred to in a case in 1831[1], you may perhaps think it right to follow that precedent, although it certainly appears to me to be contrary to principle, that where a party fails in impeaching the title to property, that property should bear the costs; but probably the best course in the present case will be to follow the precedent referred to.

Lord Brougham.—I agree there is a difficulty about costs, and I shall look further into that.

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[1] Earl of Strathmore v. Earl of Strathmore's Trustees, 1 W. & S. 402.

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Ld. Brougham's Speech.

On a subsequent day (3d August 1840) the following opinions were expressed by their Lordships on the subject of costs.

Lord Brougham.—On looking into the cases which I undertook to do, it appears that in 1831 the costs were directed to be paid to Lord Strathmore, as well those incurred in the Court below as in this House, out of the trust funds. The same course ought to be followed in the present case.

The claim made to have costs in Hoggan v. Ranken paid out of the fund collected for distribution among the creditors cannot be admitted.

There are cases, no doubt, where the Court below have gone a great way in allowing costs to parties when they sought to set aside the whole deed, not seeking to set aside a part and affirm a part, and where they failed in that attempt. The strongest of those cases is that of Morrison v. Cauvin's trustees[1] which very much resembled this Strathmore case. There the letters "ing" in the word "preceding," and the letters "ges" in "pages" in the testing clause were written on erasures, and the word "of" introduced after the word "pages," and that was held not sufficient to set aside the deed, but notwithstanding that the party failed in setting aside the deed the Court gave him costs out of the fund. The Scotch practice of allowing costs out of an estate or other fund subject to a deed which the party so allowed costs has been attempting, and that unsuccessfully, to set aside altogether, proceeds upon views extremely different from those which guide the Courts in England in

[1] 7 S. & D. 810.

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such cases. Those views may possibly require to be reconciled when other occasions arise; for the present they have been adopted, and they were, as I stated, also acted upon in a former question arising out of the same settlement. The cases of Stainton v. Stainton's Trustees[1] and of Morrison v. Cauvin's Trustees[2] are very strongly in favour of the course taken, especially the last; and acting as a Scotch court, and according to the Scotch practice, your Lordships, both in the last Strathmore case in 1831 and in Miller v. Black in 1837[3], gave the costs of the appeal in like manner.

I would, however, strongly recommend this question to the reconsideration of the Court below, and also of your Lordships when next a case shall present itself for the application of the principle, and that sureties or parties about to become sureties should regard the continuance of the practice as by no means a matter of certainty.

Ld. Chancellor's Speech.

LORD CHANCELLOR. — I quite agree with what my noble and learned friend has said. The rule which your Lordships acted on formerly is a sufficient reason for applying the same rule to the present case of the Earl of Strathmore v. Sir J. D. Paul and others. But in ordinary cases, when a party attacks the title to property and fails, that that property should bear the burden of his attack, which seems to have been the course in some of the cases referred to, is to me a matter of some surprise; and I am sure that your Lordships will feel that it is not a practice which ought to be encouraged in future cases. There is however, in my opinion, sufficient to justify it in the present case.

[1] 6 S. & D. 363. [2] 7 S. & D. 810. [3] 2 S. & M'L. 866.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the costs of all parties in the cause be paid out of the estate in question.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

[*3d August* 1840.]

(No. 13.) ALEXANDER DONALDSON, Writer in Haddington, Appellant.[1]

[*Sir W. Follett.*]

Misses JANE and ISABELLA HALDANE, Respondents.

[*Attorney General* (*Campbell*).]

Agent and Client — Reparation — Proof. — A law agent acting in the double capacity of agent for borrower and lender took an assignation to a lease as the lender's security, but without intimation to the landlord, or taking possession under the assignation. A feu right to the subjects was thereafter acquired by the borrower, who thereupon granted securities to a large amount over the property. A postponed security was thereafter taken for the original lender, on the supposition that the security under the lease had been evacuated by the feu right. The agent was in the knowledge of the extent of the prior burdens, but refrained from communicating it to the lender; the subjects afterwards fell very much in value, and proved insufficient for the prior burdens. It was alleged, on the part of the agent, that, from recent valuations of the property, he had good reason to believe it was worth 12,000*l.* or 13,000*l.* more than the amount of the prior burdens at the date of the loan.—Held (affirming the judgment of the Court of Session) that the agent was liable for the sum so lent.

1st DIVISION.
Lord Ordinary Corehouse.

IN the year 1815 Mr. Archibald Dunlop obtained a lease from the magistrates of Haddington, of the ground

[1] 13 S., D., B., & M., 610.

on which a very extensive distillery and dwelling-house are now built, for the space of twice ninety-nine years, from Martinmas 1815, for payment of an annual tack-duty of 50*l.* 10*s.* In March 1818 Mr. Dunlop borrowed 2,000*l.* from Mr. William Cunningham, for which he granted his bond, and he assigned the lease in security thereof. The assignation was intimated to the magistrates on 24th June 1818. Cunningham never entered into possession of the subjects of the lease as assignee. In 1823 Cunningham called up his money, and Mr. Henry Haldane, then residing in Haddington, being desirous of investing a sum of 2,000*l.* on heritable security, agreed with the appellant, who was the agent of Dunlop, to lend that sum on obtaining an assignation to the security of Cunningham. The following are extracts from letters written by the appellant to Dunlop relating to the transaction:—

"My dear Sir, 5th Nov. 1823.

"I am happy to say I have an assurance from Mr. H. "that he will be ready with the 2,000*l.*, and at four "per cent., upon the conditions you mention. You "should immediately send for the bond, that an assig-"nation may be prepared without loss of time. He "would have no objection to give another 1,000*l.*, but "this would cause additional expense, and might be no "object to you at present."

"My dear Sir, 10th Nov. 1823.

"When will the 2,000*l.* be wanted? I think I shall "get it from Mr. H. Haldane, at least he told me some "weeks ago that he had the needful, and wished a "good security. As it is just the sum you have to "pay, it may be got on an assignation to the former "bond."

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An assignation was thereafter prepared by the appellant in favour of Mr. Haldane, but it was not intimated to the granters of the lease, and no steps were taken to put the assignee into actual possession, or otherwise to complete the security.

In 1826 Dunlop acquired a feu right to the subjects of this lease, and in July or August of the same year he obtained a loan of 15,000*l.* from the British Linen Company, and granted a heritable security over those subjects for the same. Before obtaining the loan of 15,000*l.* from the bank, a report and estimate by two valuators had been obtained, which stated the probable cost of the distillery to have been 40,000*l.*, and its probable value to be 30,000*l.* or 32,000*l.*

Mr. Haldane died about the end of the year 1826, and, by an arrangement between all the parties concerned, the bond for 2,000*l.* and the security for the same sum were conveyed to the respondents, who consulted the appellant as their agent on the subject. In the correspondence which then occurred the appellant wrote to the brother of the respondents:—"October "1827.—I mentioned (to the late Henry Haldane) that "in my opinion he no longer held any security beyond "Mr. Dunlop's personal obligation, and that Mr. D. "would pay him up the money at the ensuing Martin- "mas if he wished it; but he said that he was quite "satisfied with Mr. D.'s own security. Under the "circumstances now stated, I do not think this can be "viewed in any other light than a personal bond." A memorial was also prepared at this time by the appellant for the respondents, intended to be laid before counsel, containing this statement:—"A principal object "with Mr. Dunlop in this transaction was, to enable

" him to borrow a considerable sum on a better security " than he could previously give, and with this to pay off " some debts secured in the same manner as Mr. Hal- " dane's. This he accomplished, and he intimated to " all who held securities that he would discharge these " at the ensuing term of Martinmas. I was autho- " rized to intimate to Mr. Haldane that Mr. Dunlop " would pay him at that term, or to tell him that " Mr. Dunlop would keep the money, if this was more " convenient for him, and he was quite satisfied with " his personal security. I think it was going to a " funeral (some time, perhaps, in August or September " 1826) that I made this communication to Mr. Hal- " dane. I explained to him the change in Mr. Dun- " lop's situation, and told him that I no longer thought " he had any security over the distillery. I do not " distinctly recollect his answer, but it was to this " effect: 'that as he had no occasion for the money, " 'and was quite satisfied with Mr. Dunlop's own " 'security, he would rather wish him to keep it.'"

On the 3d November 1827, the appellant wrote thus to Dunlop, "The Miss Haldanes, who are now in right " of your bond to Mr. Cunningham, are quite satisfied " to have you for their debtor; but it occurs to them, " if the money is to be in your hands, that they should " have the same kind of security as he got. That " you may have time to determine whether you will " do this or pay up the money they will wait your " answer till the 1st of January." On 4th February 1828, Dunlop granted a disposition of the distillery, &c. in security, and thereupon infeftment in favour of the respondents was expede. The respondents then re-

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nounced their right to the lease, which was in consequence cancelled. In 1831 Dunlop became bankrupt, and it appeared that in October 1826 he had granted further heritable security over the distillery, making a burden of 18,500*l.* The appellant was the notary who expede the infeftments in favour of the creditors in these prior burdens.

When Dunlop's estate was sequestrated, the general creditors paid the interest of the heritable debts for one year, after which, finding that the subjects would not satisfy these debts, they abandoned them to the heritable creditors. A ranking and sale was then brought, in which a witness, in 1834, deposed, that he estimated the value of the distillery at 10,000*l.*; that he had valued it about the end of 1831 by Dunlop's desire, and he then estimated it at 13,800*l.*, but that in 1825, when the distillers trade was flourishing, he would have considered it worth 25,000*l.*

The respondents, on the 10th December 1833, raised an action against the appellant, concluding for the payment of the 2,000*l.* and interest, upon the respondents granting to the appellant an assignation to the bond and disposition in security and their whole right under the same.

The Lord Ordinary (12th November 1835) pronounced the following interlocutor: "Decerns in terms "of the libel, finds the defender liable in expenses of "process, and remits to the auditor to tax the account "thereof, when lodged, and to report."[1]

[1] "*Note.*—In the circumstances of this case, there is no reason to "suppose that the defender intentionally sacrificed the interest of the "pursuers or their brother, Mr. Henry Haldane, to that of his client,

The defender reclaimed.

On the 3d of March 1836 the Lords of the First Division adhered to the above interlocutor.

The defender appealed.

Statement.

" Mr. Dunlop; but it is thought that he is bound notwithstanding to " indemnify them for the loss they have sustained in consequence of " negligence and error in his professional conduct. It is plain that in " negotiating the loan by Mr. Haldane, he acted in the double capacity " of agent both for the borrower and lender; a delicate situation, in " which more than ordinary care and circumspection are necessary. On " that occasion he neglected to complete the security in the way in which " it ought to have been done. He neither intimated to the granters of " the lease the assignation by Cunningham to Haldane, not did he put " the assignee either into actual or constructive possession. The first " omission exposed Haldane to the danger of Cunningham's bankruptcy, " and the second to that of Dunlop's bankruptcy. The first omission " was quite inexcusable, the second was neither justified, as is alleged, by " the terms of the assignation, nor by the decision in the case of Yeoman, " in 1813.

" Mr. Dunlop having obtained a feu right of the subject of his lease, " but under the burden of that lease which had been conveyed to Henry " Haldane, the defender erroneously informed Haldane that his security " was thereby evacuated. He says that Haldane on that occasion ex- " pressed his intention to let the money remain on Dunlop's personal " security, an averment of which there is no evidence, and which, if proved, " would not now be material. After Henry Haldane's death, the pur- " suers, by a compromise with their eldest brother, obtained right to the " bond and assignation from Dunlop. Whatever may have been the " intention of Henry Haldane, it is clear that the pursuers desired to " have an effectual heritable security from Mr. Dunlop, and that the " defender acted for their behoof in attempting to obtain it, though again " in the double capacity of agent for borrower and lender. The de- " fender avers that he informed the pursuers that the security created by " the assignation of the lease was evacuated by the feu right, and it " appears from his letter of the 3d November 1827, that he applied to " Mr. Dunlop for a new security to them ' of the same kind which their " ' brother got;' which can be construed in no other sense than a first " security over the subjects. Accordingly, he did obtain a heritable " bond from Mr. Dunlop, on which he expede an infeftment. But on " that occasion, though perfectly aware, as he admits, that the property " had in the meantime been encumbered to the amount of nearly 20,000*l.*, " which rendered it a security altogether unfit for a permanent invest- " ment, and which no prudent man of business acting for the pursuers

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Appellant's Argument.

Appellant.—The loss said to have been sustained by the respondents has not arisen from any omission or mismanagement on the part of the appellant, in framing the title by which Mr. Henry Haldane acquired right to the debt and security in question.

The principal subject of the assignation by Cunningham to Haldane was the debt of 2,000*l.* itself; and that assignation having been most effectually intimated to the debtor, Dunlop, — who in truth negotiated the whole transaction, and who received the assignee as his debtor, and continued to pay him the interest,—the assignation to the debt was thereby completed. Cunningham was completely divested of the character of creditor in the bond; and that character was effectually transferred to

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" would have accepted, he concealed that fact from them, and exposed " them to the loss which has since occurred.

" No sufficient excuse has been stated for this conduct on the part of " the defender. He says the pursuers relinquished their security under " the lease without his knowledge or consent; but they are not to blame " on that account, as he himself had informed them that that security " was destroyed; information singularly unfortunate, for even at that " moment, it rather appears, he might have repaired his original neglect, " and rendered it available. Another defence is, that he did give them " information that Mr. Dunlop had granted securities over his feu; " because, in his memoir to Mr. John Haldane, he had stated that the " feu right was obtained to enable Mr. Dunlop to borrow money, and to " pay off certain debts. But this communication, even if shown to the " pursuers, which they deny, and which is not proved, was much too " vague and imperfect to put them on their guard, for it neither specified " the sums borrowed by Mr. Dunlop, nor the nature of the securities he " had granted. Still less is it relevant to plead that the pursuers did not " employ him to select a security, but restricted him to take one from " Mr. Dunlop. Even if that had been the case, it was his duty to " have explained to them distinctly that Mr. Dunlop had no longer the " power to give them an effectual security, having borrowed on the dis- " tillery to the great amount above mentioned. It is plain that the " defender, misled by the apparent prosperity of the distillery—at best a " hazardous speculation, and by the supposed resources of Mr. Dunlop, " had considered the real security as of little moment, and become in- " cautious and negligent with regard to it."

Haldane, insomuch that even if the former had become bankrupt his creditors could not have claimed that debt as part of his effects. And since they could not have claimed the debt itself, which was the principal subject, of course they could not have claimed the right of lease, which was a mere accessary and inseparable from the debt in security of which only it had been assigned.

It is said that the appellant failed to put Haldane into either actual or constructive possession; but to this accusation it is sufficient to state that the transfer was completed, insomuch that Haldane was placed in precisely the same predicament in which his author Cunningham had stood.[1] The assignation of Dunlop's lease in security of this debt of 2,000*l.* had been intimated to the landlords in the most formal manner; and the debt had thereby, as the law then stood, been rendered a real burden upon his right of lease, insomuch that had Mr. Dunlop's bankruptcy occurred at that time, the assignee, or those deriving right from him, would have been secure.

When an agent is acting in a matter where there is difficulty in point of law, he is safe if he follow what was the ordinary practice at the time.[2]

The proposal of the respondents to allow their money to remain in the hands of their debtor Dunlop, on his

[1] Wallace v. Campbell, 16th Nov. 1750, Morr. 2805 and 15280; Elchies, voce Tack, No. 17.; Yeoman v. Elliot, 2d Feb. 1813, Fac. Coll.; Bell on Leases, 351, 353. 3d ed.

[2] Grant v. M'Leay, 1st Jan. 1791, Bell's Cases, p. 319; M'Lean v. Grant, 15th Nov. 1805; Graham v. Alison, 3d Dec. 1830, 9 S., D., & B. 130; Hunter, on Landlord and Tenant, p. 407; Morrison, App. voce Reparation, No. 1.

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Appellant's Argument.

granting a new heritable security to them over these subjects, came from themselves, without their consulting the appellant. The appellant was not their ordinary agent, nor did they ever ask his advice as to the propriety of leaving their money in Dunlop's hands, or of demanding farther security. He has all along expressly denied that allegation, and challenged the respondents to prove it; but they have failed to produce any evidence whatever in support of it. There is no evidence that the appellant was acting as the agent of the respondents; on the contrary, the appellant was applied to by the respondents as the agent of Dunlop, and accordingly all the charges in the appellant's books regarding this transaction are entered by him exclusively to the debit of his own client, Dunlop.

It has been shown that at the date of the transaction the subjects were of sufficient value to afford an ample security for this debt as well as for the prior debts. A law agent is not responsible for depreciation in the value of the subject of a security, if there is proper evidence, upon which he was entitled to rely, that at the date of the transaction the value was sufficient.

Respondents Argument.

Respondents.—The only question truly at issue between the parties is the legal question of liability; and upon this question the respondents contends that the grounds of judgment set forth in the note of the Lord Ordinary, and confirmed by the Court, cannot be impugned.

In the first place, the Lord Ordinary has legally found that in the transaction in question the appellant must be regarded and dealt with as having acted in the capacity of professional agent, first for the deceased,

Haldane, and afterwards for the respondents, although to what extent he so acted, or what were the duties which in this capacity he was bound to perform, may be made matter of question. It is impossible successfully to maintain that the appellant acted merely as the agent of Dunlop, having no duty to perform to the other party—that there was no obligation on him to attend to their interests—no responsibility towards them which could ever raise a claim on their part against him. The bare fact that in a transaction betwixt borrower and lender no other agent was employed, constituted the appellant the agent of both the borrower and lender, to the effect of his carrying through, so far as his professional services were required, the legitimate intentions of both; and that he was paid for his services by the borrower makes no difference in the case, because it is well known that the borrower defrays all the expenses of the loan, even where separate agents act for the parties. Indeed, the mere circumstance of professional duties being gratuitous does not diminish the necessity of rightly performing what is undertaken, or the responsibility resulting from a failure to do so. That a professional person, situated like the appellant, is to be held as the agent not less for the lender than for the borrower, and lies under a corresponding liability both to the one side and to the other, has been settled by repeated decisions.[1] The sound principle is plainly that laid down by the Court of Session, in the case of Struthers against Lang, and which was sanctioned on

[1] Struthers v. Lang, 2d Feb. 1826, Fac. Coll. House of Lords, 28th May 1827, 2 W. & S. 563; Rowand v. Stevenson, 6th July 1827, 5 S. & D. 903, 6 S. & D. 272, House of Lords, 14th July 1830; 4 W. & S. 177; Brown v. Cuthill, 28th March 1828, 4 Mur. 474

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appeal:—"It was the opinion of all their Lordships, "that it was quite immaterial from whom the party "received instructions to prepare the security. In "law the employer of the conveyancer is the party "for whose behoof the deed is prepared. The very "circumstance indeed that the instructions are given "by the debtor in the bond, his ordinary employer, "imposes on him additional responsibility in relation to "the interests of parties, who thus appear to place such "implicit reliance on his exactness and attention."

Haldane desired to have a good security before he parted with the money, and the duty of the appellant plainly was to take care that before the money was paid Haldane should be put in possession of an effectual real security over the property; but that duty the appellant altogether failed to discharge. It is not disputed that no real security ever was created in Haldane's favour; he never had more than a personal righ. The fact that the appellant took no step whatever in order to give Haldane a real security over this property, but left him with nothing more than a mere personal claim against Dunlop, is by itself sufficient to fix a direct breach of duty upon the appellant.

It is altogether irrelevant to the legal question of liability to inquire what was the value of the property in question at the time the security was taken, or how far such a security might in ordinary circumstances be regarded as a prudent or imprudent investment of money. A special obligation to procure a first security must be held implied, and, whatever might be the value of the property, to acquire merely a third security constituted a breach of obligation, the consequence o. which must legally fall upon the appellant.

LORD CHANCELLOR. — My Lords, in this case two questions arose; first, whether the defender (appellant) is liable in respect of the transactions of 1823, when the money was first advanced by Henry Haldane; and secondly, whether he was liable for the transactions in 1827, when the loan was continued by his sisters the respondents.

Dunlop, the borrower, held a lease under the magistrates of Haddington, which he had assigned to Cunningham in security for 2,000*l.* In 1823 Henry Haldane was desirous of placing out 2,000*l.* That the defender acted as professional agent for Henry Haldane in that transaction is clear, from the letters of the 5th November 1823, and the 10th November, although they were addressed to Dunlop. The security was to be upon the lease, but to effect that and make it a good security, there should be a notice to the lessor and possession taken under it, and neither was done. Dunlop afterwards obtained a feu right, but under the burden of the lease. Thus, if the original transaction had been properly carried through, a good security for the loan might have been effected, notwithstanding the feu right; but the defender thought the feu right destroyed the security, and so he afterwards informed Henry Haldane.

Henry Haldane died, and the respondents, by an arrangement with their brother's heir, became entitled to this debt. It is said that they did not represent the original lender, Henry Haldane, and that they therefore cannot maintain their demand for negligence by the defender as their agent. In the view I take of this case it is not material to come to any decision upon that point.

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Ld. Chancellor's Speech.

In 1827, on the 17th of October in that year, the defender (appellant) informed the pursuers (respondents), by a letter to their brother John Haldane, that he had intimated to Henry Haldane that the security upon the lease was void, and he repeated this opinion to the pursuers (respondents); the memoir also proves the same thing. They acted upon this opinion, and if the advice was wrong, they have clearly lost their money by the mistake. At that time the security upon the lease, which was the first charge as to it, might have been made available; but the defender (appellant) thought it void, and took a new security over the feu right, which was inferior to the old, in consequence of incumbrances of a prior date having been then created over it.

It is part of the defender's (appellant's) case that in 1827 Dunlop was solvent, and that the money might then have been recovered. The defender's (appellant's) note of the 3d of November 1827 explains why it was not; for he tells Dunlop that the Miss Haldanes were satisfied to have him for their debtor, but that they thought they should have the same security that Cunningham had got. Did he obtain such security for them? Instead of doing so, he abandoned that which was good, or might have been made so, thinking it void, and took what he ought to have known was likely to prove to be bad.

Here, then, were the Miss Haldanes with their 2,000*l.*, which they were willing to lend, or continue at interest, provided they could get a good security. It was continued, by the intervention of the defender (appellant), upon security good in form, but in reality inadequate and unproductive in the result, the property

being a distillery of the most uncertain and fluctuating value, depending upon the prosperity of the owner, sure to fall in value in case of his distress, and subject at the same time to prior debts to a very large amount, which in the result proved to be much more than the whole value.

To a claim for the loss arising out of such a transaction, the only defence that could possibly be available would be the denial of agency. But there is clear proof that the defender (appellant) acted as agent in respect of the loan for Henry Haldane, although he did not charge for such agency, the borrower being the person to pay. That he acted also for the pursuers (respondents) is, I think, sufficiently proved by his letters of the 17th of October 1827, the 23d October 1827, and the memoir and the letter of the 3d of November 1827. He does not dispute that he acted in preparing the instrument for the supposed security, and that he would have been liable to them if he had committed any error in such instrument creating an injury to them. That appears in his revised case (p. 15.), but what right has he so to limit his responsibility? He also admits in his statement of facts (p. 8.) that the respondents were his employers.

But it is said there was no want of diligence in leaving the money upon that security, because, first, the pursuers (respondents) knew well the existence of the prior charges; and, secondly, because the value of the property was then sufficient. The first proposition, if proved, would lead to no conclusion, because the consideration of the prior charges must be brought to the knowledge of the clients by their professional adviser, both as to their legal effect, and with reference to the

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value of the property. There is no evidence of value later than 1826, which appears to have been made on behalf of the owner; no means appear to have been taken to ascertain the value of the property, independently of the prosperity of the owner, which could alone render the loan secure. On the whole, it appears to me that for want of sufficient care on the part of the defender (appellant) the loss has arisen, and I therefore move your Lordships that the interlocutor be affirmed.

Ld. Brougham's Speech.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend in the view which he has taken of this case. It is impossible to get over those letters from which the appellant appears to have been acting for the Miss Haldanes after their brother's death. It certainly occurred to me, on looking minutely into the case some time ago, that the appellant had not been paid — that he had made no charge — that he had been a kind of volunteer in his conduct as a professional man. Indeed he appears to have been all along regarded as a volunteer on their part, and being the agent in this loan transaction for both the borrower and the lender, I think there is every reason to believe that he received no remuneration. The liability he has incurred in point of law becomes in consequence more hard upon him; that cannot be denied; but that he is liable there cannot be any doubt. The letter of the 3d of November, to which my noble and learned friend referred, seems to make it quite decisive that he was acting on their behalf; for in this (a letter from Mr. Donaldson to Mr. Dunlop) he says, "the Miss "Haldanes, who are now in right of your bond to

" Cunningham, are quite satisfied to have you for their " debtor; but it occurs to them, if the money is to lie " in your hands, that they should have the same kind of " security as he got;" that is, that Cunningham had.

Now what security is that? Not only a real security, which was the security that ought to have been offered to them,—which was by a great omission not offered,—but a first security. Instead of that, he takes any thing rather than a first security. He takes a security after incumbrances, one of 20,000*l.*, or at the very least 15,000*l.*, and the result is that the whole has been lost.

Now, in answer to the question, why did he not search the records in the usual way, and communicate the result of his search? it has been said, that there was no occasion to search, for he knew it perfectly well; and there is no doubt he did, for he had been employed by other parties. Then the question that may be asked is, why did he not tell the Miss Haldanes of these prior incumbrances? to which he answers, (and that is the only answer that it becomes material to call your Lordships attention to (in the 16th statement, p. 10 of the appeal case):)—" The pursuers, or their " brother Mr. John Haldane, their authorized manager " in this matter, as well as the defender, were in full " knowledge of the prior incumbrances, and that he " did not search, as he knew it from other sources of " information." The brother, Mr. John Haldane, may have known it, and probably he did, but the transaction was one on behalf of the Miss Haldanes, and he certainly ought to have told them. I mention this in addition to what my noble and learned friend has stated; it was much relied upon in the Court below, and a very strong feature of the case it is.

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I have before said that I think this a case of great hardship, but it has been made a case of greater hardship by the course taken below, and which has been abandoned at your Lordships bar, though not altogether in the papers; I mean attacks made upon the character of a professional gentleman. There are two ways of attacking a professional man for failing in his duty. The one is for negligence or mistake in point of law, and that mistake in point of law must be very gross; indeed such as is perfectly inexcusable. Negligence, or that gross and crass ignorance to which I have referred, is the only ground for this action. But there is also another ground, and that ground, though altogether abandoned here, is a little referred to in one of the papers, but in an alternative way, just as it is in the summons. That ground was most amply, and in my opinion most unjustifiably, insisted upon in the Court below; and as this is material, with a view to the only matter that remains, namely, the question of costs, I beg to call your Lordships attention to it. I pass over other matters in the papers, and come to p. 8. of the respondents case, containing their statement in the Court below:—"The short answer to this question is, that the "defender altogether failed to do so, through gross pro- "fessional misconduct." Now, that there might be no doubt what that kind of misconduct was, that it was not merely crass ignorance or gross negligence, it goes on to say, "He pretended that a change of form in the "security was necessary. This statement itself implied "that in every thing but the mere form the security "was to be the same," and so the argument goes on. But at the bottom of p. 14 of the case we have it clearly brought out in what way this misconduct is intended to

be charged upon this gentleman, and which we might well call gross misconduct if there was any ground for it. "The pursuers humbly think that they sufficiently "established on their own part that he undertook a "professional duty in which he culpably failed, and "therefore is bound to repair the consequences; and if "the principles on which they contend he has incurred "responsibility be sound, they humbly conceive that "there will be little difficulty in applying them on the "ground of any alleged hardship; for it appears clear "to the pursuers that the defender, after voluntarily "undertaking the delicate office of agent for two oppo-"site parties, truly did what was neither more nor less "than to sacrifice the interests of one of these parties "to those of the other; and now, when the bankruptcy "of the favoured client has brought an utter loss on "those whose safety he neglected, the pursuers con-"ceive that he has exposed himself to most just claim "of reparation."

Your Lordships observe this is not a charge merely of professional negligence, or even of great ignorance. I do not say that great ignorance is altogether made out; the appellant might form an erroneous view in point of law in a matter in which indeed he was wrong, but in which there was nothing like that gross professional ignorance to which I have adverted; but the charge made here is not a charge of that kind, but that he wilfully and corruptly, for it means nothing else, sacrificed the interest of one of two parties, for both of which parties he had assumed to act; namely, the interest of the lender to the interest of the other client, the borrower, Mr. Dunlop; and that he knowingly and wilfully gave Mr. Haldane, and afterwards the Miss

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Haldanes, who stood in his right, a security that was not worth a farthing in favour of Mr. Dunlop, his other and wealthier client, whom he favoured. A grosser charge never was brought against a professional man. I am bound to state, upon the best consideration I have been able to give, that this charge is wholly and utterly unsustained by the facts in the case; that it is groundless in every sense of the word. And the Lord Ordinary (Lord Corehouse) seems to have been of precisely the same opinion, for he begins his note, appended to his interlocutor, by saying, "There is no reason to suppose that "the defender intentionally sacrificed the interest of "the pursuers, or their brother, Mr. Henry Haldane, "to that of his client, Mr. Dunlop." Then he says, in consequence of negligence and error in his professional conduct, he has made himself liable; and he concludes by stating that which undoubtedly throughout the whole transaction has been the origin of the error into which he himself was led, and into which he led them:—"It "is plain that the defender, misled by the apparent pro-"sperity of the distillery, at best a hazardous specula-"tion, and by the supposed resources of Mr. Dunlop, "had considered the real security as of little moment, "and become incautious and negligent with regard to "it." And that is clearly the origin of this unfortunate transaction.

It is very seldom that these actions have prevailed. They are not often brought, and when they are brought it is very seldom they are successful. I have not known in my experience cases in the Scotch courts, or in the English, in which, to any thing like this amount, an action has succeeded. It is a case of pure hardship; it is upon the legal responsibility which he incurred on a

subject on which reference was made to him that the gentleman has become liable, and it is on that account and that account alone that his estate, for I understand he is dead, is answerable for the payment of these sums. When I say, my Lords, that the charge to which I have referred was abandoned here, I mean at the bar; for in the last two lines of the appeal papers there is a reference alternatively made to it.

My Lords, for these reasons, and considering that in this material respect the character of Mr. Donaldson stands clear of all imputation whatever, I entirely agree with my noble and learned friend, that nothing should be said about the costs of appeal, the consequence of which is that the costs of appeal are not given.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this house, and that the said interlocutors therein complained of be and the same are hereby affirmed.

RICHARDSON and CONNELL,—HOLME, FRAMPTON, and LOFTUS—Solicitors.

[*3d August* 1840.]

(No. 14.) Mrs. CATHERINE MUNRO or Ross and Husband, Appellants.[1]

[*Pemberton — James Anderson.*]

WILLIAM PAUL (M'Leod's Trustee), Respondent.

[*Attorney General (Campbell) — Lord Advocate (Rutherfurd) James Moncreiff.*]

Title to pursue — Practice — Process — (Amendment of the Libel.) — A party who was heiress under a certain deed of entail, and also beneficiary under a trust deed of the remainder of the entailer's estate not included in the entail (executed of the same date as the entail), containing powers of sale, and directing the undisposed-of residue to be settled on the series of heirs mentioned in the entail, brought an action of reduction of a sale of part of the trust property "as heiress of entail," and "as such and otherwise" having good right to pursue. No mention of the trust deed was made in libel of the summons, but in the second reason of reduction it was stated to be a deed in favour of such persons, uses, &c. as were declared in and by the entail, &c.: — Held (affirming the judgment of the Court of Session), (1.) that the pursuer could not insist in the action, in respect that her title under the trust was not relevantly libelled in the summons; (2.) that in the circumstances an amendment of the summons was incompetent.

1st DIVISION.

Lord Ordinary Cockburn.

IN 1785 the late George Ross of Cromarty made a strict entail of a portion of his lands in favour of a certain series of heirs, and, of the same date, he executed a

[1] Fac. Coll., 9th March 1837, 15 D., B., & M., 780.

conveyance of the remainder in favour of trustees, with power to sell and pay off debt, and with the residue to purchase lands, to be entailed on the same series of heirs. In 1795 the trustees, by virtue of the powers in the trust deed, entered into a contract of sale of the lands of Pitkerrie, part of the trust estate, to Donald M'Leod of Geanies, now deceased, one of their own number. A disposition was granted to M'Leod, dated 19th and 20th May 1796, on which infeftment was taken in September 1796.

In May 1836 Mrs. Ross, the appellant, a substitute heir of entail, and consequently beneficially entitled under the trust deed, brought a reduction of this sale against the trustee for the creditors of the purchaser (Mr. Paul the respondent), on the ground of incompetency and irregularity.

The summons libelled the pursuer's character as heiress of entail, and that as such and otherwise she had good right to pursue.

The second reason of reduction set forth the trust and its purposes, and amongst others the application of the residue of the trust estates, after paying debt, to the purchase of lands, to be entailed "to and upon such "persons, uses, intents, and purposes," &c., "as were "declared in and by the entail of the estate of Cro- "marty, which was executed by the said George Ross, "of even date with the said trust deed."

The summons concluded, that the lands of Pitkerrie should be found still to remain a part of the trust estate, and for payment of the rents since the sale.

Preliminary defences were given in by the respondent, admitting that the right of succession to the entailed estate had opened to the pursuer (appellant), as a

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substitute heir of tailzie; but objecting, (1.) that she had not set forth in her libel a sufficient title to pursue; (2.) or at least that she was not vested with such title, in respect she had not expede a service as heiress of entail; and, besides, (3.) that the action was barred by prescription and acquiescence.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the "summons and dilatory defences, and heard counsel "for the parties, and made avisandum, and considered "the debate and whole process, repels the first dilatory "defence of want of title, reserves the two remaining "defences to be discussed along with the merits, and "decerns; and in respect that the defender intimates "his intention to reclaim, finds him liable in expenses, "appoints an account thereof to be given in, and, "when lodged, remits the same to the auditor to tax "and report." To this interlocutor his Lordship added the annexed note.[1]

Judgment of Court, 9th Mar. 1837.

The defender reclaimed, when the Court pronounced the following judgment:—"Alter and recal the interlocutor submitted to review; and in respect the summons libels only on the pursuer's character as heir of entail of Cromarty, sustain the first dilatory defence,

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[1] "*Note.*—The Lord Ordinary repels the first defence, because he "thinks that it is sufficiently met by the fact, that the possession of the "character in which the pursuer sues is not only set forth in the summons, but is admitted in the defences to belong to her; and after this "the defender cannot urge an objection which in substance amounts to a "denial, or at least a doubt of what they themselves admit; and he reserves the other two defences, because, although it be possible that they "may ultimately supersede the necessity of considering the merits, it is "possible they may not, and on the whole the case will be put into the "most convenient and an equally safe shape by being kept all together."

"and dismiss the action, and find the pursuer liable in "defender's expenses." The opinions delivered by the judges are annexed.[1]

The pursuers appealed.

Appellants Argument.

Appellants.—It being admitted in the defences that the appellant, Mrs. Ross, is heiress of entail of Cromarty, and that the trust deed is in favour of the same persons as are called by the entail executed on the same day, it must be held to be clearly established, on the face of the record of this process, that the appellant is the party beneficially interested under that trust, and is consequently entitled to sue out a reduction of any deed granted to her prejudice. Accordingly, the title and interest set forth on the summons is sufficiently distinct and specific, inasmuch as the appellant sues as the

[1] *Lord Gillies.*—"This is a question as to the form of proceeding; and "the point to be determined is, whether the title on which the pursuer "insists,—that of beneficiary under the trust, is competently set forth in "her summons. On looking to the summons, I find the only title "libelled in the part of the summons appropriate for that purpose is the "entail. But it is now said by the pursuer, that she insists as beneficiary "under the trust deed, and that it will be seen from the second reason "of reduction, that she has in her that character. Now, I doubt very "much if the omission of the title to pursue in the proper place of the "summons can be cured by any subsequent allegations in another part, "such as the reasons of reduction; I do not think we can allow so "important a matter to be gathered from other parts of the summons, "and pass over its omission in the proper place. I see nothing for it, "therefore, but to dismiss the action, because we can never admit of an "amendment of a summons to the effect of inserting the title to pur-"sue. A defect in so essential a part of the libel is a fatal vice, which "cannot be cured.

Lord Mackenzie.—"I feel the same difficulty as Lord Gillies, and I "am inclined to concur with him in thinking the objection to the sum-"mons a fatal one. The title libelled is that of 'heiress of entail,' 'and "'as such and otherwise' having right to prosecute the reduction. "Now, if we throw out of view the words 'and otherwise,' the only "title specified is that of heiress of entail. But that is not the character

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heiress of entail, "entitled to succeed to the lands of "Cromarty and others, and as such and otherwise "having good and undoubted right," &c. The character of heiress of entail comprehended in græmio all the rights and interests to which such heiress was by the trust deed, executed unico contextu and in furtherance of the purposes of the entailer, entitled. The trust deed is set forth in the summons, and is thus directly founded on by the appellant as a ground on which she sued, in addition to that of heiress of entail. A service by the appellant was wholly unnecessary, that being only requisite either to take up something that remains in an ancestor, or to prove some disputed fact; and as in Rutherford v. Nesbit, 12th Nov. 1830[1], a party, whose apparency was admitted, was allowed without a service to bring a reduction, so here the appellant did not require to have vested in her any other title than that which, by the admission of the respondent, she possesses. [*Lord Chancellor.*—The judges do not say that the title as heiress of entail is not sufficiently set out, but that no other title is set out.] It is in her

"in which she now insists, because she now adopts that of beneficiary "under the trust deed, which is not libelled on as a title to pursue; for I "cannot think we can hold that the words 'and otherwise' are to have "any effect whatever in remedying so important an omission as that of "passing over, wholly unnoticed in the proper place, the deed under "which the pursuer intends to insist.

"The action must therefore be dismissed.

Lord President.—"I concur. The only title relevantly libelled is that "of heiress of tailzie. The words 'and otherwise' cannot have the effect of "allowing the pursuer to insist in any character she may have narrated "in the subsequent part of the libel.

Lord Corehouse.—"I am of opinion that the title on which the pur-"suer now insists is not relevantly libelled, because it is not mentioned "in the proper part of the summons. I do not think the omission "can be remedied, and, therefore, on that ground the action must be "dismissed."

[1] 9 S., D., & B., 3.

character of heiress of entail of the estate of Cromarty, in which character the residue of the trust estate is destined to her, that the appellant is entitled to complain of any act of malversation. As heiress of entail she has a legal title to enforce the obligation on the trustees to complete the investment of the residue, or to bring back the funds within the operation of the trust. She necessarily unites both titles in her person, and having the first she of course has the second, which cannot by possibility be vested in another. The particular interest she is seeking to enforce is specially described in the second reason of reduction.

But even if the summons had been defective in the specification of title, the Court ought to have allowed an amendment of the libel, instead of de plano dismissing the action. The Court allowed a new title to be libelled, in Sheriff of Teviotdale v. Lord Cranstoun[1], and in the Laird of Meldrum, 28th July 1716[2], which was the case of a reduction; and in more modern practice, in Kerr v. Kerr, 16th Dec. 1830[3], Millar, 21st May 1831[4], Campbell v. Mitchell[5], and Hutton v. Gibson[6], both which last were cases of reduction. There is nothing in the acts of sederunt which authorizes the Court to deal more stringently with reductions than with other summonses requiring amendment. [*Lord Chancellor*.—Did the appellant ask leave to amend?] It may be collected from both reports[7] that such an application was before the Court.

Lord Advocate.—A minute ought to have been given in.

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[1] 1 Bro. Supp. 179.
[2] Mor. 12152.
[3] 9 S., D., & B., 204.
[4] Ibid. 625.
[5] Ibid. 875.
[6] 2 Sh. App. 110.
[7] D., B., & M., and Fac. Coll.

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Mr. Anderson.—The usual practice is to ask leave by motion, not by a minute.

Attorney General.—I cannot doubt that such an application was adjudicated upon, and refused.

Respondent's Argument.

Respondent.—The title libelled by the appellant was not sufficient to entitle her to insist in the action of reduction. By her title as heiress of entail and provision to the lands of Cromarty, she had no right to challenge any act done under the trust, or to interfere at all as to the lands the title to which is challenged in the reduction. She could not sue a reduction of land rights without a service[1], and the respondent was not bound to plead to the action, in respect that without a service no judgment would have been res judicata in regard to the documents sought to be reduced. A pursuer in such circumstances, before requiring a defender to produce a title, is bound to show that she has a title which is likely to be affected by the deeds which she craves may be set aside; she ought to produce the titles by which she has that interest. Stair[2] and Erskine[3] state the nature of the action of reduction, and hold that production of the title is requisite. In England production cannot be enforced under the subpœna duces tecum until the plaintiff shows his title to maintain that he is injured. The characters of heiress of entail and beneficiary under the trust are separate and distinguishable; they are created under distinct deeds, and apply to different subjects.

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[1] Edmonston, 16th March 1637, Mor. 16089, and cases in Mor., p. 15,409, 16,088, 16,091, 16,096, 16,117; M'Allum, 16,135; Anderson, 22d June 1832, 10 S., D., & B, 696; Graham v. Hunter, 14th Nov. 1828; 7 S. & D. 13.

[2] 4. 20. 3., App., p. 833.

[3] 4. 1. 19.

Respondent's Argument.

An amendment of the libel in circumstances such as the present would have been altogether incompetent under the forms of process in Scotland. No provision is made in the late judicature act (6 Geo. 4. c. 120.), or in the relative act of sederunt of 1828, as to amendment of the libel in reductions, although a party may add reasons of reduction, that being, as is clear from the 50th section of the act of sederunt, the only amendment contemplated in reductions. The act of parliament (6 Geo. 4. c. 120. s. 27.) makes certain provisions as to summonses of reduction among others, but expressly "without prejudice to the present form of reductions "in other respects." The practice so reserved will be found explained in the act of sederunt, 1st January 1726. In section 3. of that act it is required that "in "reductions the pursuer do set forth specially in his "libel the writs upon which he founds his title;" and section 4. of the same act of sederunt provides for new reasons of reduction being libelled, without providing for any amendment as to the title of the pursuer.

Lord Eldon, in the case of Lord Kinnoul v. Gray (21st March 1805), said, that in matters of form like the present "this House will give the Court below "credit that in points which regard their own practice "they are right, unless it can be shown beyond the "shadow of a doubt that they are wrong;"[1] and that dictum may fairly be acted on in the present instance.

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case has given me great anxiety, because it would appear at first sight

[1] See also Lord Brougham, in Magistrates of Annan v. Farish, 14th July 1837, 2 Sh. & M'Le. 930.

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that, from the length of time which has elapsed since the period of the transaction now sought to be set aside, the party might find it impossible, failing this suit, to institute another. At the same time, however, when we observe that the transaction alluded to is now of more than forty years standing, we appear safe to infer that a suit of that sort is not very likely to succeed, and therefore it is not probable that the appellant will sustain any loss if your Lordships should see reason to adopt the judgment which has been pronounced by the Court below.

My Lords, this is an action of reduction, seeking to set aside a transaction which took place in the year 1796, the pursuer (appellant), who was interested in the trusts of a deed, alleging that the trustees under that trust deed in 1796 improperly dealt with the estate, in selling part of it to one of themselves. The objection disposed of by the Court below is, that the pursuer (appellant) has not set out her title. Now it appears that in actions of reduction the whole form of pleading is very strict, and is subject to rules which are not applicable to other actions. In the first place it is enacted by the judicature act (6 Geo. 4. c. 120.), under the 2d section, "that "from and after the 11th day of November next in all "ordinary actions in the Court of Session the pursuer "or pursuers shall in the summons set forth in explicit "terms the nature, extent, and grounds of complaint "or cause of action." That is applicable to ordinary actions. Then a subsequent part of the statute, namely, the 27th section, applies to actions of reduction, and it recites, "whereas according to the forms now observed "in the Court of Session, there are certain classes of "actions in which the forms of process, and the mode

" of preparing and discussing the cause, are different " from those observed in the class of causes called ordi- " nary causes; but it is expedient that all classes of " causes should, as nearly as may be, consistently with " the nature and object of the action, be prepared for " decision and discussed according to the method and " on the principles above laid down;" and then it enacts, " that all rescissory actions, except reductions of the " Court of Admiralty in maritime causes, shall from and " after the 11th of November next be enrolled and con- " tinued before the junior Lord Ordinary, and the said " actions shall, with such exceptions as the judges under " the powers herein-after delegated to them shall think " necessary, be prepared and discussed according to " form and method already directed with regard to " ordinary actions, but without prejudice to the present " forms of actions of reduction in other respects."

My Lords, by an act of sederunt of an early date, 1st January 1726, it was provided, " That in reductions " and improbations the pursuer do set forth specially " in his libel the writs upon which he founds his title;" And by another act of sederunt (11th July 1828), subsequent to the late judicature act, it was provided, that " in reductions to be enrolled before the junior Lord " Ordinary, if the defender is to object to the title of " the pursuer, or to plead an exclusive title, or to state " any other objection against satisfying the production, " he shall return defences confined to these points."

It appears, therefore, that where a party seeks to reduce instruments, the first question is, whether he has shown sufficient title to justify him in calling for the reduction of the instruments which he seeks to have reduced? It is thought desirable that the defender

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should, in the first place, have an opportunity of challenging the pursuer's title to reduce the instruments, for which purpose it is provided that the pursuer shall state the writs on which he supports his title to reduce.

Now it appears, by the summons, that the pursuer alleges that she is the heiress of tailzie and provision entitled to succeed to the lands and barony of Cromarty under the deed of entail made and executed by the deceased George Ross, dated the 9th of December 1783, "and as such and otherwise" she has "good and undoubted right along with her husband to prosecute and follow forth the action of reduction under-written;" and then comes a specification of the instruments which she seeks to reduce.

Nothing can be more distinctly stated than that her title is as heiress of tailzie and provision under that entail, because, although the words "and otherwise" are introduced, and have been made the subject of argument at the bar, it is quite clear that if the rule be that the party must set forth the right under which she claims, she cannot improve the statement by the words "or otherwise," there being no statement of any other title under which she claims. The sole title, therefore, under which the party seeks to have these instruments reduced is as the heiress of tailzie and provision under the entail of 9th of December 1783.

But, my Lords, when matters come to be investigated, it turns out that that was not the title she meant to found on at all. It appears that she was and is admitted to be heiress of tailzie and provision under the deed mentioned; but the suit, it further appears, does not relate to the estate settled by that deed, but to another estate conveyed by a separate deed of trust, by

which the property thereby conveyed was vested in trustees, who were empowered to sell the same after paying certain charges, and to lay out the surplus in the purchase of an estate, which, when so purchased, was to be held for the party who should be heir of tailzie under that deed; and that the real object of the suit is to set aside a sale by these trustees, as contrary to the terms of the trust. But that is quite a different title from that which the pursuer has stated in her summons. Her title is under the trust deed, and not under the deed of entail; but she says in the summons that her title is as heiress of tailzie and provision under that entail. The only way in which her title is to be found out at all is, not by reference to the part of the summons where she sets out her title, but in that part which enumerates the grounds of reduction. When she comes into Court to ask for reduction, under an enumeration of her reasons for asking reduction the purport and substance of that trust deed is stated; so that it is perfectly true that, looking to the whole of the summons, and calling in aid the statement which I find among the reasons of reduction, — putting the two parts of the statement together, there would be enough to show what was the title of the pursuer; that is, you may guess at, rather than find stated, the title on which she comes into Court to seek a reduction of those deeds. But that is not what the rule requires; for the rule requires her to set forth her title, and where she professes to set forth her title, she sets forth that which is not her title at all.

The question then is, whether that was not such a departure from the rules of practice as to justify the Court of Session in saying that the suit was not in a

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state in which the pursuer could proceed, the defender contending, as a preliminary defence, that there was no title set forth. The question strictly is not one of Scotch law, but of Scotch pleading, and this should of itself make one very careful in overturning that which has been decided by the unanimous decision of the Judges of the Inner House. The Lord Ordinary thought that under the circumstances the other part of the summons might be resorted to; but when I look at the provisions made by the Court of Session by these acts of sederunt, and consider that such rules have been thought essential to the administration of justice in cases of this sort, I cannot concur in this view, because I cannot help thinking that if such latitude of pleading were permitted, there would be no security for the observance of those rules which have been made, in order to compel parties, coming into Court to seek to reduce an instrument, to put themselves into such a situation, that their opponents may, in the first instance challenge their title to come into Court at all.

One other point was raised, — whether the pursuer should be permitted to amend. The Court of Session thought she ought not to be permitted to amend. That is a question so purely of Scotch practice, that I should be very unwilling to lay down a rule inconsistent with that acted on by the Judges; and when we look at what this suit is, and see that the object is to open up a transaction of the year 1796, which for forty years had been permitted to remain without challenge, and that there is very little probability that after that great length of time there could be such a case made as would enable the party to obtain that relief which she seeks, I cannot but think that the Court of Session exercised a very sound dis-

cretion in excluding the party from amending. Under these circumstances I would recommend to your Lordships to affirm the interlocutor of the Court of Session, with costs.

The House of Lords ordered and adjudged, That the said petition of appeal be and is hereby dismissed this house, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the respondent the costs incurred in respect of the appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—ARCHIBALD GRAHAME, Solicitors.

[*3d August* 1840.]

(No. 15.)

DUNCAN STEWART, Appellant.[1]

[*Attorney General (Campbell) — Sir W. Follett.*]

WILLIAM GIBSON, Respondent.

[*Dr. Lushington — Tinney.*]

Et e contra.

Pactum Illicitum—Stat. 29 *Geo.* 2. *c.* 16., *and* 33 *Geo.* 3. *c.* 2. *—Order in Council,* 11*th May* 1803. — An American ship was sent from Britain on a joint adventure to the coast of Africa for the purchase of slaves; a quantity of arms and gunpowder were sent also from Britain by a British ship, under the direction of the party conducting the adventure, security having been found, in terms of the existing regulations, that the same should be expended in trade upon the coast of Africa; the arms and gunpowder were afterwards transhipped on board the American on the African coast, and the American ship was seized and condemned as contraband: — Held (affirming the judgment of the Court of Session) that the whole transaction was illegal, and that consequently no action of accounting in regard thereto could be maintained between the parties concerned.

Title to pursue — Society. — Question, whether one partner of a company, out of the funds of which the expense of fitting out the vessels as above stated was defrayed, is entitled, privato nomine, to sue a third party, an alleged participant in the adventure, for a proportion of such advance,—raised, but not decided, in respect it was held (reversing the judgment of the Court of Session), that, in the circumstances, the claims insisted on were not well founded.

[1] Rep. in 6 S. & D. 733; 9 ibid. 525; 12 ibid. 683; 14 ibid. 806.

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1ST DIVISION.

Lords Ordinary Eldin, Corehouse, Newton, and Fullerton.

Statement.

BY the statutes 29 Geo. 2. c. 16. ss. 2, 3, and 4. and 33 Geo. 3. c. 2. s. 2. power was given to the King in council, by proclamation or order in council, to prohibit the exportation of gunpowder, arms, and ammunition when he should see cause, and for such time as should be therein expressed; and it was enacted, by section 4. of the last-named statute, that every ship on board of which any gunpowder, arms, and ammunition should be carried out of this kingdom, or on board of which such articles should be laden, when the same should be prohibited by proclamation or order in council to be exported, should be forfeited, together with all her guns, ammunition, &c., and the same should be subject to seizure. There is a proviso in section 5. of the same statute, that nothing therein contained shall prevent any ship from taking or having on board such quantities of naval stores as may be necessary for the use of such ship during the course of her intended voyage, or from having and taking on board, by licence from the Lords of the Admiralty, any arms and ammunition for the necessary use or defence of such ship.

By orders in council previous to 11th May 1803, the carrying of gunpowder, arms, and ammunition from this kingdom in any ship was prohibited, under the penalties and subject to the proviso contained in the above statute (excepting where required and licensed for the use and defence of the ship.) An order in council was issued, on 11th May 1803, in the following terms: —"That all ships and vessels clearing out for the coast "of Africa, for the purpose of carrying on the slave "trade there, be permitted to take on board, as an "assorted part of their cargoes, as much gunpowder and "as large a quantity of trading guns, pistols, cutlasses, "and flints, lead balls, bars, and shot as the exporters

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"shall think necessary, provided that sufficient security be given to the principal officers of his Majesty's customs of the port in which the ships are fitted out, and before they proceed on their respective voyages, in treble the value of the articles exported, that the same shall be expended in trade upon the coast of Africa; which security is not to be cancelled until proof that such expenditure has been made by the oath of the captain or master of the ship or vessel, in like manner as is prescribed with regard to spirits and East India goods used in carrying on that trade."

In 1806 the Washington, an American ship, belonging to James Broadfoot, an American citizen, was placed by him at the disposal of William Gibson and Company, merchants, Liverpool, of which firm the pursuer (respondent) and William Broadfoot were partners. A power of attorney was given to the pursuer (respondent) enabling him "to sell the said ship Washington, to appoint and discharge the officers and seamen, and do every thing concerning the said ship that I could do were I myself personally present." Acting under this power, the pursuer (respondent) apportioned an adventure in the African slave trade amongst several persons, of which he was to have one fourth, and the defender (appellant) one eighth, and the pursuer (respondent) was to pay his share of the adventure, being 1,400*l.*, to Gibson and Company. Gibson and Company were to have a commission of 5*l.* per cent. for fitting out the ship and purchasing the cargo. The Washington was accordingly dispatched to the river Congo, whence she was to proceed to Charleston in Carolina. The defender Stewart sailed as supercargo and in command of the vessel. She carried four guns, and was per-

mitted, by a special order upon application of the pursuer as manager of the adventure, to carry 3½ barrels of gunpowder "for defence of the ship," and "not for the "purpose of trade." She was largely insured.

The pursuer (respondent) soon after dispatched the British ship Croydon to the Congo, with thirty cases of fire-arms and thirty barrels of gunpowder, licensed and cleared out for the purpose of trade. On her arrival in the Congo the muskets and powder were transferred on board the Washington, which last vessel was immediately captured as contraband by a British privateer, and, with the cargo, was condemned as a legal prize, and conveyed to Surinam. A suit was then commenced in the Admiralty Court at Barbadoes, which terminated in the restoration of the vessel; but this was reversed on appeal to the Privy Council, where the vessel was condemned as a legal prize. In the meantime the ship and cargo were, by arrangement between the parties, sold at Barbadoes. The defender (appellant) was occupied about a year attending to the judicial proceedings and looking after the ship.

Much loss was incurred in this adventure, the expense of which had been defrayed out of the funds of Gibson and Co.; for a proportion of which William Gibson and Co. brought an action in Scotland against Stewart, in 1811, but which action was dismissed, in respect there was no evidence that Gibson had the authority of his partner Broadfoot for entering into the speculation.

In 1822 William Gibson, the pursuer (respondent), brought an action in his own name against Stewart (appellant), concluding for 1,272*l.* 8*s.* 7*d.*, "being the "balance arising upon his eighth share of the Wash-"ington and cargo;" also 1,132*l.* 9*s.* 4*d.*, "being money

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"received by him (Stewart) in Barbadoes from the "pursuer's agents, and applied to his own purposes;" also 139*l.* 16*s.* 3*d.*, "conform to state of accounts to be "produced."

The appellant stated various pleas in defence, particularly that the pursuer was not in titulo to recover the sums even if due, but without expressly pleading the illicit nature of the transaction as a defence.

The Lord Ordinary (Eldin) decerned (1st February 1827) in terms of the libel.

The defender (appellant) reclaimed, and thereupon, with the leave of the Court, by virtue of section 11. of the 6 Geo. 4. c. 120., stated on record, as an additional plea, the illegality of the adventure.[1] The Court allowed that plea to be added, as appearing to be supported by the facts stated by the pursuer in article 8. of his condescendence as follows; viz. "In order to facilitate "the purchase of the Washington's cargo of slaves, "the pursuer had shipped, by a British vessel named "the Croydon, from London for the river Congo, "a quantity of muskets and gunpowder, which were "to be delivered to the defender, or his order, on "their arrival in that river; and the defender, before "he sailed in the Washington, received a bill of lading "of those guns and powder, which are accordingly "entered in the general invoice book of the adventure "referred to in article 5. The reason why the muskets "and powder were shipped by the Croydon from Lon-

[1] It had previously (1814) been determined by the Common Pleas in England, in a case arising out of the above joint adventure, that Gibson could not recover insurance from the underwriters, on the ground that the shipment by the Croydon was a fraud on the statutes and order in council above referred to, and that the condemnation was good evidence of the ship having been engaged in an unlawful act. See Rep. 1 Marshall, 41, 119; 5 Taunt. 433.

" don was, that by the existing orders in council no " foreign ship was allowed to carry these articles, under " certain penalties. After coming to an anchor in the " river Congo, the defender applied to and received " from the commander of the Croydon delivery of the " muskets and powder, but instead of carrying them " ashore, as he ought to have done, he very improperly " carried them on board the Washington. This trans- " action was witnessed by a British letter of marque " privateer called the Prince of Orange, the commander " of which immediately went on board the Washington, " and took possession of her as a prize, and afterwards " carried her to Barbadoes for adjudication, on the " ground that she had more guns and powder on board " than was allowed by the sufferance from the custom- " house at Liverpool."

Judgment of Court, 7th Mar. 1828.

The Court, on 7th March 1828, pronounced the following interlocutor (signed on the 8th):—" The Lords " having resumed the consideration of this note, with " the whole proceedings following thereon, and heard the " counsel for the parties, they alter the interlocutor of " the Lord Ordinary complained of, sustain the defence " founded on the illegality of the adventure, and assoilzie " the defender from the conclusions of the libel, so far as " the same relate to the sum of 1,272*l.* 8*s.* 7*d.* sterling " concluded for, and decern; also find the defender " entitled to the expenses incurred by him in defending " himself against the conclusions of the libel from " which he is assoilzied; appoint an account thereof to " be given in, and remit the account, when lodged, to " the auditor to tax the same and to report; and fur- " ther, in regard to the other conclusions of the libel, " remit the same to Lord Corehouse, Ordinary, in

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"place of Lord Eldin, to proceed and do further there-"in as to his Lordship shall seem proper."

When the case went back to the Lord Ordinary an additional record was made up, in which the pursuer (respondent) claimed the above-named sum of 1,132*l.* 9*s.* 4*d.*, "as advances made to the defender "(appellant) in the year 1807 by Messrs. Francis "Dixon and R. A. Hyndman, the pursuer's agents, "Barbadoes, which were by the defender applied ex-"clusively to his own private and personal purposes." In the record the items of the account were stated in detail; among others, 745*l.* sterling, being a sum twice paid as costs of a lawsuit in Barbadoes relating to the seizure of the ship, and the sums of 22*l.* 10*s.* and 16*l.* 12*s.* 6*d.*, Barbadoes currency, part of the costs of the same suit, and some expenses incident to the ship while in Barbadoes. These sums were paid to the defender by the agents in Barbadoes, and to them repaid by bills drawn upon and retired by Gibson and Company; and the same sum of 750*l.* was afterwards allowed by the court at Barbadoes to be retained by the defender out of the proceeds of the ship and cargo when sold. It appeared that the 139*l.* 16*s.* 3*d.* was the value of certain parts of the cargo which were alleged to have been taken from the Washington before the capture, and applied by the defender (appellant) in paying a debt he owed to some natives. These several sums formed items in Gibson and Company's account of the adventure. The defender claimed, as a set off, remuneration for his trouble in attending to the proceedings relative to the condemnation of the ship.

A minute and answers were thereafter given in to Lord Newton as Ordinary, in room of Lord Corehouse.

Statement.

The cause afterwards came to depend before Lord Fullerton, Ordinary, who (11th July 1833) appointed cases to be lodged, and suggested in a note that they should contain a "clear and connected statement not only of "the judgments already pronounced, but of the par- "ticular facts upon which the parties now mainly "rely in support of their arguments on the remaining "points."

Judgment of Court, 6th June 1834.

The Lord Ordinary reported the cases to the First Division of the Court, and their Lordships (6th June 1834) pronounced the following interlocutor:—"The "Lords having advised the mutual cases on the points "remaining undecided, and heard the counsel for the "parties, repel the defences; find the defender liable "to the pursuer in the sum of 745*l.* sterling, and also "in the sums of 22*l.* 10*s.* and 16*l.* 12*s.* 6*d.*, Barbadoes "currency, mentioned in the pleadings, with the legal "interest of the said several sums from the respective "dates stated in the account, No. 8. of process, till "paid, and likeways in a proportion of the commission "charged in said account, corresponding to the two "last-mentioned sums, with the legal interest thereof "till paid; also find the defender liable to the pursuer "in the sum of 139*l.* 16*s.* 3*d.*, with interest thereof from "the 31st day of December 1816 till paid; remit to "the Lord Ordinary to hear parties on the defender's "claim for remuneration, and the pursuer's claim for "the remaining articles of said account, No. 8. of pro- "cess, and to do therein and in the cause as to his "Lordship shall seem just and consistent with the "above findings, and reserve for his Lordship's consi- "deration the question of expenses."

The case having then returned to Lord Fullerton,

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Ordinary; and minutes of debate upon the points contained in the above remit having been lodged, his Lordship (30th May 1835) pronounced the following interlocutor, having the subjoined note annexed: — "The "Lord Ordinary having heard parties' procurators, and "having considered the revised minutes and former pro- "ceedings, repels the defender's claim for remuneration, "and also repels the pursuer's claim for the articles of "the account, No. 8. of process, referred to in the remit "from the Court, and decerns accordingly; farther, "appoints parties to be heard on the remaining points "in the cause, if any, and also on the point of ex- "penses."[1]

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[1] "*Note.*—On the first point, viz. the defender's claim for remune- "ration on account of his attendance and services in the West Indies, "during the proceedings which terminated in the condemnation of the "vessel, the Lord Ordinary thinks that, in the circumstances of this case, "it is inadmissible. It is a claim on equitable grounds advanced by the "defender, who was not only the master of the vessel, but a partner in "the adventure; and had the accounting for the ultimate loss proceeded "agreeably to the principle assumed in the summons, the claim might "perhaps have formed a very reasonable article in that accounting on the "side of the defender. But the defender has pleaded the condemnation "of the vessel, and the illegality of the contract ascertained by that con- "demnation, in bar of all accounting or claim against him as partner for "any share of the loss, and that plea has been sustained by the Court. "Having taken the benefit of such a plea, he is not, in the opinion of "the Lord Ordinary, entitled to make any demand on the score of "services performed in relation to the adventure, and before it was termi- "nated by the condemnation of the vessel.

"Secondly, The Lord Ordinary can see no ground for the pursuer's "claim, in relation to the articles of the account forming the only re- "maining point in this discussion. These are certain items which were "included in that account, — an account paid to the defender, first, "by the bills drawn by him on Dixon, and afterwards paid to him "a second time by Hyndman, and taken credit for by Hyndman, on "settling with the captors for the proceeds of the vessel. By the former "interlocutor of the Court the pursuer has recovered the full amount "of that account from the defender of which he had received a double "payment; and what the pursuer now demands is another repayment of

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Judgment of Court, 16th Dec. 1835.

Both parties reclaimed, and the Court, 16th December 1835, pronounced the following interlocutor upon the appellant's note: — "The Lords having advised this "reclaiming note, and heard the counsel for the "parties, adhere to the interlocutor reclaimed against, "so far as it respects the claim for remuneration, and "refuse the desire of this note; remit to the Lord "Ordinary to dispose of what remains of this cause "and of the expenses." And of the same date the counter reclaiming note for the respondent was likewise refused.

Parties having thereafter been heard before Lord Fullerton, Ordinary, his Lordship, 14th January 1836, pronounced the following interlocutor:—"The Lord "Ordinary having resumed consideration of this cause, "and heard parties' procurators, in conformity with

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"certain articles, which he says ought not to have been allowed to the "defender at all in either account.

"The parties differ as to the principle of the judgment of the Court; "and if the Lord Ordinary had considered that the present question "depended on any particular view of the Court in pronouncing it, he "would again have reported the case. But this course appears to him to "be unnecessary, as in any view which can be taken the pursuer's claim "is untenable. By the decision already pronounced he is completely "indemnified; and such being the case, and even taking his own view of "the judgment, as proceeding on the ground that Hyndman in claiming "the amount from the captors acted as his agent, it is impossible to see "why he should claim the articles now in dispute from the defender, or "how it can be relevantly stated that those articles ought not to have "entered into the account at all. The case is now precisely the same as "if there had been no previous payments to the defender by Dixon's "bills, and as if Hyndman, viewing him as the pursuer's agent, had paid "those items to the defender, and then taken and got credit for them in "accounting with the captors. Now, had that been done, it would seem "a most extraordinary proposition to maintain that the pursuer was "entitled to recover from the defender the amount of those very charges "which he or his agent had got credit for from the captors, on the single "ground that, whether justly or not, they had been actually paid to the "defender."

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" the special findings contained in the interlocutor of " the Court, of date the 6th June 1834, decerns " against the defender for payment to the pursuer " of the following sums, viz. the sum of 745*l.* sterling " with the legal interest thereof from 29th September " 1807 till paid; item, the sums of 22*l.* 10*s.* and " 16*l.* 12*s.* 6*d.*, Barbadoes currency, amounting toge- " ther, at the rate of exchange stated in the account, " No. 8. of process, to the sum of 28*l.* 9*s.* 6*d.* with the " legal interest thereof from 26th March 1807 till paid, " together with the sum of 1*l.* 8*s.* 6*d.* sterling, being " a proportional part of the commission charged in said " account, corresponding to the said sum of 28*l.* 9*s.* 6*d.*, " with the legal interest thereof from 29th September " 1807 till paid; item, the sum of 139*l.* 16*s.* 3*d.* " sterling, with the legal interest thereof from 31st " December 1816 till paid; and grants warrant for the " extracting hereof ad interim: finds the defender " liable to the pursuer in the expenses he has incurred " relative to the second and third conclusions of the " libel, but subject to such modification as to the " Lord Ordinary may seem right; and remits to the " auditor to tax the account thereof, and to report."

The appellant reclaimed, and the Court, 20th May 1836, pronounced the following interlocutor:—" The " Lords having advised this reclaiming note, and heard " counsel, adhere to the interlocutor reclaimed against, " and refuse the desire of this note; and remit to the " Lord Ordinary to modify the expenses referred to in " the interlocutor: find the defender liable in the " expense incurred by the pursuer in the Inner House " since the date of the said interlocutor; and remit " the account thereof to the auditor to tax the same

Judgment of Court, 20th May 1836.

" and report to the Lord Ordinary, with power to his " Lordship to dispose of such report as shall be just."

There were cross appeals presented.

Statement.

Stewart the defender appealed from the interlocutor of Lord Eldin, dated 1st February 1827; the interlocutor of the Inner House, dated 7th March 1828, in so far as it entertained any of the conclusions of the libel, and did not assoilzie the appellant in toto, and find him entitled to his whole expenses; the interlocutor of the Inner House, dated 6th June 1834; the interlocutor of Lord Fullerton, dated 30th May 1835, in so far as it repelled the defender's claim for remuneration; the interlocutor of the Inner House, dated 16th December 1835, adhering to the last-mentioned interlocutor of Lord Fullerton; the interlocutor of Lord Fullerton, dated 14th January 1836; and the interlocutor of the Inner House, dated 20th May 1836.

The pursuer (respondent) presented a cross appeal against the interlocutor of the 7th March 1828, in so far as it sustained the defence founded on the alleged illegality of the adventure, assoilzied the appellant from the conclusion of the action relative to the sum of 1,272*l.* 8*s.* 7*d.*, and found him entitled to the expenses of defending himself against that conclusion, and the interlocutor decerning for the taxed amount of those expenses, and also the interlocutor of the Lord Ordinary of the 30th May 1835, and the interlocutor of the Court of the 16th December 1835, in so far as they repel the respondent's claim for the remaining articles of the account No. 8. of process.

The defender (appellant), in his answer in the cross appeal, repeated his argument on the illegality of the

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adventure, and stated that the articles in the account dismissed by the Court were either included in the 745*l.* or were paid out of the funds which belonged to the captors.

Appellant (*in the original appeal*).—The respondent Gibson has neither title nor interest to maintain this action, because the adventure under which he claims was never effectually formed; and because, at all events, it was not he, but William Gibson and company, who made the alleged furnishings and advances of which payment is sued for; and the respondent holds no right, either directly or indirectly, to the funds of that company. The respondent's own statement in the closed record establishes, that it was not the respondent who made the advances on account of which he makes the present claim, but William Gibson and company; and therefore, if any sum is due by the appellant on the head of these advances, it is to William Gibson and company, and not to the respondent. The respondent's statement in the record is, that the advances were made "out of the funds of William Gibson and "company, of which he (the respondent) was the "managing partner." The account, too, containing a state of the advances, is entitled "Ship Washington "and owners, in account current with William Gibson "and company." The summons in the former action proceeded on the statement that the money was due to William Gibson and company. In that action he argued, that "the action was properly brought against "the defender at the instance of the petitioner (respon-"dent) for himself and for William Broadfoot, the "partners of the company."

The respondent is not entitled to claim the sums in dispute, in respect that that adventure which he did attempt to carry into execution, and in consequence of which the claim is made, was illegal. This proposition is clear not only from the judgment of the Common Pleas, but upon the facts of the case as stated by the respondent himself; and the interlocutor of the Court, in March 1828, is beyond dispute well founded.

Independently of the obvious fact that the sums sued for, and sustained at the pursuer's instance, are partes ejusdem negotii, equally tainted with illegality as the other sums sued for and disallowed, the appellant is in a situation to show that the respondent's claims to those sums which have been found due to him by the Court below are not well founded on their merits. In the first place, the 745*l.* was not paid to the appellant, but to Dixon, the agent at Barbadoes, and never was intermeddled with by the appellant, so that no claim can lie against him on that head. 2dly, The appellant cannot be liable for these expenses, on the ground that a sum of equal amount was received by him from Hyndman out of the proceeds of the condemned property, for the funds out of which Hyndman made that payment belonged exclusively to the captors. The captors were aware of the great labour, and trouble, and expense which the appellant had incurred in this business, and though they were not called upon to reimburse him; yet as this money had been paid on that head, they were sensible that it would be unfair to deprive him of it, and settled accounts upon the footing of it remaining with him. 3dly, The sum paid by William Gibson and company on account of these expenses, being 745*l.*, was charged by them in their account current with the adventure, and upon that account current a balance of 1,272*l.* 8*s.* 7*d.*

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Appellant's Argument.

was brought out against the appellant as his eighth share of the loss. Every farthing which they advanced or alleged they had advanced was there charged, including extravagant commissions and accumulated interest to the extent of between 5,000*l.* and 6,000*l.* The present demand, therefore, which is rested upon their having paid these expenses, is just a second or double charge for the same sum. When William Gibson and company charged all their advances, their demands on account of the adventure must surely be held as closed. The respondent demanded from the appellant 1,272*l.*, which, according to William Gibson and company's own account, was his eighth share of all the sums expended by them in relation to the adventure, including the very expenses in question.

The respondent's claim for 139*l.* 16*s.* 3*d.* arises from goods said to have been taken by the appellant from the Washington after the capture, and of course after ship and goods had been the property of the captors, and from expenses incurred in an attempt to recover the insurance on the appellant's commission as supercargo. If the interlocutor holding the sums before adverted to be well founded, it must be on the ground that they were unconnected with the adventure; and hence it is submitted to be indisputable that the claim of the appellant, for remuneration for services performed to the adventure under special employment, is also unconnected with it, and fell to have been sustained.

Respondent's Argument.

Respondent (*in the original appeal*).—The note to the interlocutor of the Lord Ordinary truly states the grounds upon which the appellant has properly been found liable for the sums in question.

The appellant having twice received payment (from

the respondent's agents) in the West Indies of the amount of the costs of the admiralty suit, and having accordingly, by his letters written on his arrival in Britain, desired that he should be debited with the amount of Hyndman's bills for the second of those double payments, was properly found liable in restitution thereof to the respondent.

Respondent's Argument.

The appellant, after having pleaded the illegality of the adventure in bar of all claim of accounting against himself as a partner therein, was not entitled, upon the supposition of that plea being well founded, to insist in any claim of remuneration for services alleged to have been performed by him in relation to the adventure before its termination by the condemnation of the vessel.

The following observations were made at the conclusion of the hearing of the cause on 26th January 1838.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, it appears to me that farther investigation will be required before I state my opinion upon the case at your Lordships bar. At present I have very great difficulty with regard to the party who brought this suit. It is not proved that in the Court of Session, a practice, which appears necessary for the purpose of administering justice in this country both in the courts of law and equity, prevails, namely, that those with whom a contract is made should be the parties who sue upon that contract. Beyond all doubt the contract in this case was not made with the individual who instituted this proceeding. Indeed he does not state that the contract was made with himself; on the contrary, the summons states the contract to

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have been made on behalf of the firm of Gibson and company. This is a question with respect to which it is very important to have the best information, before we lay down a rule which shall be binding upon the courts in Scotland; and I shall be glad to obtain such farther information as I can as to the practice in the Court of Session.

With regard to the question of illegality, I entertain no doubt that the Court of Session were right in pronouncing this transaction illegal upon the facts as they appear upon the papers. It is not disputed by the counsel at the bar that if we had before us a contract to do that which subsequently took place it would be illegal. If the contract had been in so many words, that an adventure should go out, relating in part to certain articles of merchandize which might be legally taken, and in part to arms and ammunition which by the law of the country could not legally be taken, and it was thereby agreed that in order to evade the law, no part of the arms and ammunition should be carried out in the ship which was to carry out the other goods, but should be carried in another ship to a place out of the immediate power and jurisdiction of this country, and then should be transhipped into the ship carrying the merchandize, that would be a transaction illegal, in violation of the British law, and a contract upon which no relief could be given.

Now we find that in point of fact that is the nature of the transaction in question, which was carried on under the immediate management of the party now sueing on the contract entered into; and all your Lordships have to do is, to make up your minds whether that which subsequently took place did form part of the contract between the parties or not,—whether the illegality of the

one part of the transaction would not affect that part of the transaction which is alleged to be legal. Seeing what took place, and looking at the invoice, I cannot doubt that the whole formed one transaction, and, consequently, that the whole was affected by the illegality which it is admitted existed with regard to part of it. If your Lordships should be of that opinion, the only question will be how far the illegality of the transaction affects the particular sums in question between the parties.

Ld. Brougham's Speech.

Lord Brougham.—My Lords, I confess that upon this case I have felt from the beginning very great embarrassment from not having before us, according to the better practice of former times, a note of the opinions which were pronounced by the learned judges who dealt with the case in the Court below, and of the reasons upon which those opinions were founded. The consequence of the absence of this great desideratum in the present case is, that we do not know upon what grounds any one part of this decision has been pronounced. Upon some branches of it we may have less doubt than upon others, particularly respecting that which forms the subject of the cross appeal, the illegality of the transaction, whereupon the present appellant was assoilzied from his claim. But then, we still have not any means of telling in what light the Court below, in the opinions which they ultimately came to, and in the judgment which they ultimately pronounced, regarded the two most material portions of the case which form the subject of the original appeal,—I mean the question of parties, which extends over and pervades the whole case, the matter of the cross appeal as well as the original appeal, and the

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question as to the sums of 745*l.*, 139*l.*, and the two smaller sums of 22*l.* and 12*l.* severally, which formed the subject of the cross appeal alone. And this is the more to be regretted with respect to these last-mentioned sums, inasmuch as it leaves us entirely in the dark and without the power of forming even a conjecture of the grounds upon which their Lordships came to one judgment with respect to the 1,272*l.* 8*s.* 7*d.*, assoilzieing from that claim on the ground of illegality, and another judgment respecting the lesser sum, allowing that claim, although to all appearance that claim comes within the scope of the argument of illegality, as much, and in the same way, and for the self-same reasons, in which and for which, the judgment proceeded against the claim of the larger sum, as arising from an illegal contract.

My Lords, what I said respecting the want of notes of the Judges' opinions has to a certain degree anticipated, and will show your Lordships, what my opinion is respecting the merits of the case. Now, first, I shall take that which relates to the improper party who has brought the action, because that goes over the whole case, both the original and the cross appeal; and it is not a mere technical objection which is here taken, —it is not the same kind of objection as a plea of abatement in our courts for the non-joindure of a defendant, but it is rather the case of a nonsuit by the non-joindure of a plaintiff. In the one case it may be matter of form, but in the other case it is matter of substance. If a contract is made by A. with B., A. of course may be sued upon that contract by B., and vice versâ; but if a contract is made by A. and B. with C., shall A. alone sue C. upon that contract, unless he produces an authority from B. or a release by B., which comes to

the same thing? In both of these cases B. must sue as well as A., for doubtless the contract enuring to the benefit of both, being made by both, the performance of it must enure to the benefit of both, and both, and not one, have a right to come into Court against the other party and sue the other party.

Now, my Lords, nothing has been stated in this case which at all satisfies me that there is, either in point of form or in the substantial law of Scotland, any difference, with reference to this particular, from those principles which regulate our courts of equity as well as of law in this country; nothing which shows that the principles on which the courts of Scotland proceed differ from those principles which by natural justice, or even according to the plain dictates of common sense, must be the rules of proceeding in all courts of law or equity. Nevertheless, I am disposed to agree with my noble and learned friend in not pronouncing at present upon this, although it would be a shortening of the whole question, both the original and the cross appeal, because it is barely possible there may be some rule which we are not aware of, and it may be as well that we should postpone our decision for further information.

I must proceed, in the second place, to say that I do not think the question will necessarily arise in this case at all. First, with respect to the cross appeal: upon that I entertain no doubt whatever; the question has been disposed of in the Court below as regards the sum of 1,272*l.* 8*s.* 7*d.*, upon the ground that there was an illegal agreement in which this voyage and speculation had its origin, that that illegality rides over the whole adventure and speculation, and that ex dolo malo non oritur actio. Perhaps, correctly speaking,

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dolus malus does not apply to what is illicitly done, but to what is malum in se, so that there is no dolus malus, properly speaking, here, but there is pactum illicitum, and there is dolus malus in evading the positive enactments of the municipal law. But ex pacto illicito non oritur actio. It is said that here there was a legal agreement completed on or before the 27th of May 1806, and that that is not vitiated and rendered illegal by a sort of reaching backwards, because on the 2d of June afterwards, on the African coast, something was done which must be admitted to be illicit and in contravention of our municipal law. Now this is a question of fact; and the question is, whether the circumstances of the case do not afford sufficient evidence, I should say, irrefragable evidence, of the two proceedings being connected inseparably together, both forming parcels of one transaction, both making up one adventure in trade, and that adventure becoming illegal altogether, because bottomed in and originating from that which was in itself illegal.

We are asked to go a great way when we are called upon to believe that these two adventures were not one transaction; we are asked to go a little further when we are called upon to believe that they had not a close connection with each other; but we were asked to go a length which I am sure no man of ordinary, plain, common sense and understanding can accompany the respondent in going, when we are called upon to say that there was no connection whatever between the two, and that the one was entered into without any prospective looking forward to the other, and that the other was entered into without any retrospective view to the former. Yet all this we must believe before we can admit the

argument of the respondent (and it is necessary for his case, absolutely necessary, before he can overturn the decision of the Court below brought here by his cross appeal); that is to say, we must believe all this before we can suppose that the matter admitted to be illegal matter was collateral to the legal matter, and that the legal matter was independent of and uninfluenced and unaided by the illegal matter. Can any man believe that so material an article as gunpowder to a great amount, muskets, flints, and other arms and ammunition to still larger amount, a chest of 400 stand of arms and a chest of 200 stand,—that all this was an after thought, just a sudden, accidental fancy that seized upon these slave traders after they had wholly completed their adventure, had arranged their outfit, and had contracted with one another for the carrying on of their crime (which used to be called a trade,—but which has now obtained its proper appellation, by an act of parliament which I had the happiness to bring in, with as great pleasure as any thing I ever did in my life, I mean the felony act of 1811); that in the arrangement of this adventure, in the conspiracy by which they planned a crime to be perpetrated upon the coast of Africa, the powder and muskets had never entered into their imagination up to the 27th of May, but that having arranged a cargo of beads, having got an assortment of tartan hussar dresses, among other things, for the poor natives whom they were going to plunder and murder and torture in carrying them through the horrors of the middle passage,—that these tartan dresses and beads, by which they were to get the mothers to sell their children, and the different members of families to sell their relations,—that all these were put aboard the vessel on the 24th of May,

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and that they never thought of muskets and gunpowder and flints—till when? The time is material here. Till the 2d of June; so very long a period after as no less than six days. No less than six days afterwards it was that they suddenly thought, what are we doing? We are going to Africa, but we are going to murder and rob the people there, and therefore we must have gunpowder and muskets. We are going to get the poor people to help us in our robbery and murder, and therefore we must have beads and other things. Therefore let us go and illegally put them on board, and as we cannot put them on board at Liverpool let us put them on board at the River Congo.

Now it is as to that we are called upon to judge. We are called upon to say that this was a totally collateral and unconnected adventure, wholly foreign to that which happened six short days before. My Lords, this is totally impossible; and I really feel that I ought to apologize for having dwelt so long upon it. I am perfectly clear that this is one transaction, one voyage out. The invoice speaks no other language; the book which has been produced in the proceedings below speaks no other language; the abstract jumbles them altogether, and mixes them all up as one transaction: the party is debited with the whole. But, above all, the whole scope and circumstances of these proceedings plainly show, that it is one united joint connected transaction, not two several transactions.

My Lords, even if I had more doubt than I have, (I say I have none,) I should really think that it would not become your Lordships, upon a mere matter of fact, to be very ready to reverse the decision of the Court below; that when four learned judges have drawn a

conclusion upon facts, that you should take another view of these same facts, and, having no other materials whereby to modify the opinion arrived at in the Court below, should say from thence, we arrive at an opposite conclusion.

Upon the whole, therefore, I have no doubt whatever, but entirely agree with my noble and learned friend, that the cross appeal must be dismissed, and, in my opinion, with costs. I do not see a shadow of ground for this cross appeal.

Now, my Lords, I have thus disposed, in my humble opinion, of part of the original appeal; I cannot divine what the Court meant by taking a distinction between the 139*l.* 16*s.* 3*d.* and the 1,272*l.* 8*s.* 7*d.* This matter seems to me to be in one or other of two predicaments. Either there is, which I strongly suspect, a blunder altogether (I speak with great respect) and this 139*l.* is part of the 1,200*l.* and odd, because that 1,272*l.* 8*s.* 7*d.* is called an eighth;—an eighth of what? How does the 139*l.* 16*s.* 3*d.* happen to get out of the scope of that dividend of which the 1,272*l.* 8*s.* 7*d.* is the quotient? By the process of dividing by eight; I think there is nothing suggested to show why the 139*l.* 16*s.* 3*d.* did not come within the scope of that process of division; if so, it is disposed of by the part of the judgment assoilzieing from the 1,272*l.* 8*s.* 7*d.* Or suppose it is a separate sum from the 1,272*l.* 8*s.* 7*d.*; then does not it come within the scope of the illegality? How can you differ the 139*l.* from the 1,272*l.* 8*s.* 7*d.*? I can see no difference. I am therefore perfectly ready to say that the judgment cannot stand as regards the 139*l.* 16*s.* 3*d.*

With respect to the libel I think it is hardly necessary to enter into that. The two small sums of 22*l.* and

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12*l.* I think may be put out of the case; but with respect to the 745*l.*,— that is the part of the case as to which I stated during the learned attorney general's reply I feel most doubt, because it is involved in considerable obscurity as to the ground upon which the Court below proceeded. I am inclined to go along with the argument in the reply, however, and to consider, that either upon the ground of want of parties in this case, which would ride over this part as well as over the other, or upon the ground that at all events Gibson cannot claim this, the decision here is wrong. But I think it right to add that I do not see how the question of illegality affects the 745*l.*, though I am of opinion that it affects the 1,200*l.* and the 139*l.* If I should ultimately feel prepared to advise your Lordships that that 745*l.* has been well allowed as not coming within the scope of the illegality, and also that it has been well allowed because well claimed, inasmuch as there is no foundation for the alleged want of proper parties — and only upon that assumption can it be said that it is well claimed,—if it should be found upon further inquiry that there is no foundation for the objection of the want of proper parties, I do not see how there should be any allowance made by way of set off in the nature of a quantum meruit to the other party. Though I feel the pressure of the argument of the want of parties, I feel also, as Dr. Lushington argued, that it would be setting off a quantum meruit against a legal demand. But, as at present advised, I am inclined to think that we shall never come to that set off at all, and that upon further inquiry, in all probability your Lordships may be advised to reverse the whole of the decision on that point. I am quite clear that with respect to the

cross appeal, you ought to affirm it, with the costs of appeal.

My Lords, I have entered into the matter at this great length, with a view to save your Lordships the trouble of hearing any further arguments when you ultimately decide the case. It may be understood that, unless we come to another opinion upon making further inquiry upon that part of the case, what has now been said may be considered as the reasons for reversing the judgment. If we come to another opinion, of course it will be affirmed.

My noble and learned friend has suggested to me, that though it is quite clear what we shall do on the cross appeal, it is not usual, in deciding two appeals, to decide the cross appeal first, and then to consider the original appeal. It is quite clear what the judgment will be upon the cross appeal. My noble friend agrees with me, in imposing upon the parties the trouble of bringing a note of what passed in the Court below; in all probability such a note would have enabled us to dispose of it at once.

The Attorney General.—I feel the very great importance of what your Lordship has said; but your Lordship will allow me to say, that you will only expect a note where reasons are given, and that unfortunately it often happens that the Inner House give their decision only without giving the reasons.

Lord Brougham.—We know that in Westminster Hall it has been the usual practice, since the time of Lord Kenyon, upon the important questions that go from the Court of Chancery to the Courts of Common

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Law, that they certify their answer without giving reasons. That has been found so inconvenient that the Court are now disposed to come back to the old and better practice. I hope the Court of Session will not be offended, if we apply to them the same observations which have been applied to the Courts of Westminster Hall, and that they will take the trouble of giving their reasons as well as giving judgment. Perhaps a knowledge that it has been proposed here will be an inducement to those very learned persons to adopt that course. I have the greatest respect for them, and wishing to have their reasons is a token of our great respect.

Further consideration deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, upon the principal question in this case, viz. the illegality of the transaction from which the question between the parties arose, there is, I think, no doubt. It has, I think, been very properly adjudged to be so by the Court of Session. It is not disputed that it would have been a violation of the act of parliament to have exported the arms and ammunition in the Washington; therefore they were sent in another ship, for the purpose of being transhipped into the Washington, when it might be thought safe so to do, and this was accordingly done upon the coast of Africa; and the ship and cargo being seized were afterwards condemned.

All the questions between the parties must therefore, in my opinion, be considered with the assumption that the adventure was illegal, and this will dispose of the pursuer Gibson's appeal against the interlocutor of the 7th March 1828 and the 10th June 1829; and, it

appears to me, that necessarily carries with it the reversal of the interlocutor appealed from by the defender Stewart, so far as the Court found him liable to pay 139*l.* 16*s.* 3*d.*, which appears to be the value of certain parts of the cargo, which were applied by Stewart, the captain, in paying a debt he owed to some natives. If the whole adventure was unlawful, there can be no right to recover this sum. If, the cargo having been sold, an action had been brought for the proceeds, and the illegality of the adventure had been set up and established, the pursuer could not have recovered, and so the Court of Session have determined. Why is this sum, being a part of the adventure, not to be affected by the same rule? If the captain had sold the goods represented by the 139*l.* 16*s.* 3*d.*, he could not, according to the decision, have been made responsible for the proceeds. Upon what principle then has he been made responsible for them; because, instead of receiving value for them in money or goods, he has received value in the liquidation of his own debt. The captain indeed alleges that the goods were not so applied until after the capture, by which they ceased to be the property of the pursuer. In neither case however can the pursuer be entitled to recover the value of them.

This part of the case is also included in the question, whether the pursuer can maintain a suit founded upon transactions, not with himself individually, but with Gibson and company, in which firm he was a partner; and as this question, if decided in the negative, will conclude all the subjects of appeal against the pursuer, it requires particular consideration. The ship Washington belonged to James Broadfoot, an American citizen. The pursuer Gibson and William Broadfoot

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carried on business in Liverpool in partnership under the firm of Gibson and company. The ship was sent to Gibson and company, for the purpose of being fitted out at Liverpool in 1806, for an adventure in the slave trade, and a power of attorney in the most ample terms was addressed to the pursuer Gibson, enabling him to deal with the ship to the extent even of selling it. Under this power Gibson apportioned the adventure amongst several persons, of which he, the pursuer, was to have one fourth, and the defender one eighth. The letter to him informed him he was to pay 1,400*l.*, his share of the adventure, to Gibson and company; and that as they had been at the sole trouble of fitting out the ship and purchasing the cargo, and their responsibility was pledged for the amount, they were to have 5*l.* per cent. commission. The accounts of the ship were kept under the heading of "ship Washington and owner, with "William Gibson and company." The ship having been captured and ultimately condemned, though ordered to be released by the Court of Admiralty in Barbadoes, expenses on account of the suit there, and on account of the ship, and of the defender personally were incurred, which were paid to the agents there by bills drawn upon Gibson and company, which were paid by them; and some of the items comprising the sum for which such bills were drawn constitute part of the pursuer's demand.

The pursuer in 1811 brought an action against the defender for the alleged balance of his account, in the name of himself and his partner William Broadfoot, but after many years it was decided by the Court of Session that such suit could not be maintained, because it appeared that the pursuer had not had the authority

of his partner for entering into this speculation. In consequence of that failure, the pursuer has brought the present action in his own name, not alleging any transfer to him of any interest of his partner William Broadfoot, but claiming right in himself to sue for and recover the sums alleged to be due to the defender on account of this joint adventure, although all the money transactions were with Gibson and company, and although the pursuer had only one fourth and the defender one other eighth of the adventure.

It does not follow, because one partner exceeds the limits of his authority as between himself and his copartners in any transactions he may enter into, that the firm is not pledged to those with whom the dealing takes place in the name of the partnership. A decision, therefore, that the pursuer had not the proper authority to bind William Broadfoot, his partner, in those transactions, proves nothing in the question, whether he can alone sue those with whom he dealt in the name of the firm.

That the funds of Gibson and company were employed in the adventure is admitted; that they paid the bills drawn from Barbadoes is a fact common to both statements. How the account stands between Gibson and William Broadfoot does not distinctly appear, although it is alleged that Gibson is debtor to his partners; but under such circumstances, how can the pursuer be entitled to receive the repayment of what the firm of Gibson and company have so advanced? Yet such would be the result of the interlocutor decerning for payment to the pursuer of the 745*l.* If, therefore, it were necessary to decide this question, I should not hesitate to advise your Lordships to reverse the interlo-

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cutor appealed from by the defender upon that ground alone.

There appear to me, however, to be other grounds which make it unnecessary to decide expressly upon that point. The interlocutors of 6th June 1834, 14th January 1836, and 20th May 1836, find the defender liable to pay to the pursuer 745*l.*, 22*l.* 10*s.*, and 16*l.* 12*s.* 6*d.* These sums are composed of the expenses in the Admiralty Court at Barbadoes, and some expenses incident to the ship whilst there, and said to have been due to the defender, who was there employed in attending to the interest of the owners. The amount was advanced by Dixon and company, the agents in the island, and repaid to them by bills drawn by the defender upon the house of Gibson and company, by whom they were paid, and so constituted items in the account of that house with the ship. If the defender had by those means obtained payment of sums to which he was not entitled, such overcharges might properly be the subject of investigation in settling the accounts of the adventure, but they could only be items in such accounts; and if, from the illegality of such adventure, no legal investigation of such accounts could be enforced, upon what principle can the repayment of particular items of such accounts be decreed?

The objection applies to every item, and though the particular sum should appear to have been improperly charged, it is impossible, without taking the whole account, to know whether it ought to be repaid, or merely to be disallowed in the account, as it cannot be known whether the balance be due to or from the party against whom such is disallowed.

It appears, however, that by far the greater part of these charges, that is, all the expenses in the Admiralty Court, were properly paid by Gibson and company on account of the adventure, being the expenses of protecting the property against the claim of the captors, and which was successful in the island. But these expenses, it is said, were paid twice over, the amount having been deducted from the proceeds of the sale of the ship; and such appears to have been the fact; but such deduction was made from the proceeds, which were the property of the captors, and not of the pursuer or of Gibson and company; and though apparently improperly made, no injury was thereby done to the pursuer. If the payments were properly made by Gibson and company in the first instance, no right to recover back the amount can arise from their having been improperly placed to the account of and so improperly paid by the captors.

It was argued that this deduction, having been made by order of the Admiralty Court at Barbadoes, amounted to an adjudication that the sums ought to be paid out of the proceeds of the ship. This, however, does not appear to be so, the order of the Court of Admiralty being only to permit the deduction till the account should be settled; and it appears that no part of the 745*l.*, paid to Dixon and company, came to the hands of the defender. These payments, too, are subject to the same observation, that they were transactions with Gibson and company, and not with the pursuer, and that they constitute only items in the account of the adventure, the illegality of which precludes all parties from asking the adjudication and assistance of the Court, and therefore equally precludes the discussion of any parti-

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cular items of the account. For the same reason and upon the same ground I think the defender is precluded from claiming remuneration; indeed, as the pursuer recovers nothing in the action, this claim of the defender cannot arise.

The result is, that the interlocutors appealed from by the defender ought to be reversed, so far as they find him liable to pay any thing to the pursuer, and to pay costs to him; on the contrary, the pursuer ought to pay the costs below of the defender, as he was, by the interlocutor of the 14th of January 1836, ordered to pay the costs of such part of the suit in which he was then held to have failed; of course there can be no costs of the appeal by the defender. The appeal by the pursuer must, I think, be altogether dismissed, and with costs.

Ld. Brougham's Speech.

Lord Brougham. — My Lords, I agree in the view taken by my noble and learned friend of this case. The whole rests manifestly upon the illegality of the transaction, it being unnecessary to have recourse to other ground; though in that I concur with my noble and learned friend,—I mean with respect to the partnership.

It is not true, as it was attempted to be argued, that this decision respecting the illegality must rest upon importing into the cause the judgment in the Common Pleas. That judgment is not imported. The authority of the case holds, but as to the facts we have no right to go to the Court of Common Pleas; we must apply this judgment as an authority in law to the facts found in this case, and the facts in this case are perfectly sufficient to enable us to apply to it the authority of the judgment in point of

law; that judgment being upon the legality or illegality of the contract, and the facts in the case showing what the transactions were whereunto that contract bore reference.

The facts are stated in the 8th article of the pursuer's own condescendence. It is needless to remind your Lordships that we have in this case nothing to do with the illegality of the slave trade; this transaction was some time before that was put down by law. The pursuer had shipped by a British vessel named the Croydon, from London for the river Congo, a quantity of muskets and gunpowder, which were to be delivered to the defender or his order, "he "being the supercargo of the Washington," on their arrival in that river; and the defender, before he sailed in the Washington, "received a bill of lading of those "guns and powder." Of what guns and powder? of the guns and powder shipped in the Croydon. Now it was legal to ship those guns and powder in the Croydon, a British vessel, but it was illegal to ship them in the Washington, a foreign vessel; but nevertheless the supercargo, who had the management of the whole adventure, and who actually sailed in the Washington to the Congo, "received a bill of lading of those guns and powder, "which are accordingly," (says the party himself,) "entered in the general invoice book of the adventure "referred to in article 5th." And when we look to article 5th, we find it is a duplicate of the invoice book of the ship, cargo thereto relating, outfit, and insurances: and "relative bill of lading, conform to foresaid invoice "book, signed by the master, David Adams, in favour "of the defender," (that is, Stewart, the present appellant,) "as supercargo;" so that it is perfectly

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manifest that this indissolubly connects the adventure in the Washington with the proceedings in reference to the cargo in the Croydon; and the Court of Common Pleas thought that the voyage of the Washington was in fact as much altogether an illegal voyage as if the cargo had been originally shipped (which it could not be) in the foreign vessel, the Washington, and not in the Croydon. And (as one of the learned judges below very properly observed) there was nothing in this proceeding to prevent, instead of the transhipping of these goods (the powder and stores, and so on,) in the Congo in Africa, their being transhipped in the river Thames, and shipped to America in contravention of the order in council. The transhipment made in the Congo to the Washington is alleged to have been made contrary to the orders of the master of the cargo. But supposing he had landed the goods, as it was contended he had a right to do, and not put them on board the Washington, still the question is, whether the sending them to the Congo in the Croydon was not merely colourable, in order that they might be under the control of the pursuer, who had the charge of the foreign vessel; and therefore it does not depend merely upon the fact, which is admitted, of his having sent the goods on board the Washington. It appears evidently what the intention of the parties throughout the whole was; and even if they had been landed, still the evidence would, in my opinion, have gone far to prove the illegality of the transaction.

The House of Lords ordered and adjudged, That the interlocutors complained of in the said original appeal, in so far as they entertained any of the conclusions of the libel, and did not assoilzie the said Duncan Stewart from the

whole of the said conclusions, with expenses of the said action, be and the same are hereby reversed: And it is further ordered and adjudged, That the said interlocutors, in so far as they find that the said Duncan Stewart is not entitled to any remuneration for his services, as mentioned in the said interlocutors, be and the same are hereby affirmed: And it is further ordered, That the expenses of the said action in the Court below, in so far as the same relate to any claim made by the pursuer against the defender, be taxed and ascertained according to the practice of the said Court, and when so taxed and ascertained be paid by the said pursuer to the said defender: And it is also further ordered and adjudged, That the said cross appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is also further ordered, That the said appellants in the said cross appeal do pay or cause to be paid to the said respondent therein the costs incurred in respect of the said cross appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE & ROBERTSON — RICHARDSON & CONNELL, Solicitors.

[3d *August* 1840.]

(No. 16.) INCORPORATION of TAILORS of ABERDEEN, Appellants.[1]

[*Lord Advocate* (*Rutherfurd*).]

ADAM COUTTS, Respondent.

[*John Stuart.*]

Personal or Real—Irritancy.—Held (affirming the judgment of the Court of Session) that certain obligations in a burgage disposition were of such a nature as to be binding upon singular successors, without being declared real burdens or being fenced with irritancies.

Process—Pleading—Irritancies, Declarator of.—Opinion expressed by Lord Brougham as to the form of a summons of declarator as to certain irritancies in a burgage disposition, and the findings to which the pursuers were, under the conclusions of the summons, in the circumstances, entitled.

1st DIVISION.

Lord Ordinary Corehouse.

Statement.

IN 1829 James Stevenson, then deacon, and John Dunn, then boxmaster, of the Tailors Incorporation of Aberdeen, raised an action of declarator implement, &c., in the Court of Session, against Adam Coutts, advocate in Aberdeen, to have it found and declared, that by the terms of the articles and conditions of roup, and of the feu charter and disposition, of a lot of the ground on which Bon Accord Square was built, and particularly mentioned in the summons, the whole obligations, stipulations, provisions, conditions, and declarations particularly set forth in the said summons, attached and

[1] 13 S., D., & M., 226, and 2 Sh. & M'Le. 609.

applied to and were binding upon the said Adam Coutts, as disponee of George Nicol, therein mentioned, and that Coutts, and his heirs, executors, and successors, were bound to implement and fulfil the same in so far as not already implemented; and farther, to have it found and declared, that the said Adam Coutts was further and separately bound to implement and fulfil the whole of the said obligations, stipulations, provisions, conditions, and declarations, to the extent libelled, in consequence of having been clerk to and professional agent and legal adviser of the said incorporation in the transaction libelled, and in consequence of his having in these capacities prepared and framed, or revised and sanctioned, on the part of the said corporation, the articles of roup, feu-charter, and disposition libelled, and having actually represented to the said incorporation that the intention and understanding of the said incorporation, specified in the summons, had been legitimately carried into effect; and that accordingly the whole of said obligations, stipulations, provisions, conditions, and declarations did attach and apply and were binding upon heirs, disponees, assignees, singular successors, and successors of every description who might succeed to or acquire the piece of ground described in the summons, and houses built or to be built thereon or any part or portion thereof; and farther concluding that the said Adam Coutts should be ordained to implement the obligations and make payment of several sums of money, all particularly specified in the summons.

A record having been closed, the Lord Ordinary (11th January 1831) pronounced the following interlocutor:—"The Lord Ordinary, in respect it is averred "by the defender that the conveyance of the area in

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"question granted by the Corporation of Tailors to "George Nicol, which was prepared and executed by "him or under his direction, is exactly in the same "terms as those which have been granted by the cor- "poration for upwards of twenty years past, in cir- "cumstances the same as the present, in so far as this "action is concerned, and that both before and after "the corporation were aware that conveyances so "framed did not render many of the conditions of the "feu-right effectual against singular successors, the "omission being intentional, and expressly approved "by the corporation with a view to prevent the dis- "couragement of feuars, and that this averment is "denied by the pursuers; and farther, in respect it is "averred by the defender that after acquiring Nicol's "feu he disposed of part of it bonâ fide to his brother "before this action was raised, of which averment there "is no evidence hitherto produced; and in respect it is "averred by the pursuers that the defender in January "1828, since he acquired right to the subjects in ques- "tion, did, under cloud of night and without consulting "the corporation, form a drain from those subjects "communicating with the common sewer, which he "has ever since used, and that this averment is denied "by the defender, by desire of parties, allows the "defender a proof of the said two averments made by "him, and to the pursuers a proof of the said aver- "ments made by them, and to both parties a conjunct "probation."

Thereafter his Lordship pronounced this interlocutor: —"(16th November 1832.)—The Lord Ordinary, hav- "ing considered the revised cases for the parties, with "the record, proof, productions, and whole process,

" finds that the burgage disposition by John Finlayson, " boxmaster of the Corporation of Tailors in Aberdeen, " in favour of George Nicol, on which Nicol was infeft, " superseded, by the consent of these parties, the feu " charter previously granted by the corporation to " Nicol: Finds, that the following obligations imposed " upon Nicol, the disponee, by that disposition, viz., an " obligation to grant a personal bond for the payment " of the ground rent, and performance of the conditions " in the articles of roup; the obligation to pay a pro- " portion of the expense of erecting the rail and wall " round the centre of Bon Accord Square; the obli- " gation to lay pavement on the east and west end of " the subjects conveyed, and the obligation to erect an " iron rail at the east end of the subjects fronting the " said square, not being protected by clauses of irri- " tancy, nor contained in Nicol's infeftment, are not " binding on his singular successors in the subjects: " Finds, that the pursuers have not proved their aver- " ment, that the defender, in drawing or revising the " feu charter and burgage disposition to Nicol, omitted " intentionally, and from corrupt and fraudulent mo- " tives, such clauses as were requisite to make these " obligations real burdens, or to render them effectual " against singular successors; and farther, that the pur- " suers have not proved their averment that the de- " fender had an interest, at the date of the said convey- " ances, to act corruptly or fraudulently in preparing " them: Finds the averment of the defender proved " that, during a long series of years, and in a number " of cases, before the date of the said conveyances to " Nicol, and in some instances afterwards, conveyances " were granted by the corporation to persons acquiring

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"lands from them under articles of roup, the same, in "so far as this question is concerned, with the articles "under which Nicol purchased; which conveyances "were in substance the same as his, or equally defec- "tive, and were prepared, some of them by the de- "fender, and some of them by other agents, and were "occasionally revised and approved of by the corpo- "ration or their legal advisers: Finds that the defender "is not barred, personali exceptione, on the ground of "professional ignorance, negligence, or any other cause, "from availing himself of the rights and privileges "which would have been competent to any other sin- "gular successor to Nicol, and therefore assoilzies the "defender from the conclusions of the libel, in so far as "the above-mentioned obligations are concerned, and "decerns: Finds the averment of the pursuers proved, "that the defender, without the consent or knowledge "of the corporation, did clandestinely and under cloud "of night open a communication between his property "and the common sewer mentioned in the libel, and "used the said common sewer or took benefit by it, in "respect of which, and of drains conducted to the said "sewer by his author, Nicol, finds the defender liable "to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his "proportion of the expense of the said sewer, with "interest as libelled, and decerns: Finds the pursuers "liable to the defender in the expenses of process, in so "far as they relate to the conclusions from which the "defender is hereby assoilzied, and the defender liable "to the pursuers in the expenses of process, in so far "as they relate to the question concerning the common "sewer; and remits the accounts, when lodged, to the "auditor to tax and to report."

Against this interlocutor both parties reclaimed.

Statement.

The reclaiming note for the pursuers prayed the Court "to recal the interlocutor, except in so far as it "finds and decerns against the defender, and to decern "and declare, quoad ultra, in terms of the conclusions "of the libel."

The reclaiming note for Coutts prayed their "Lord-"ships to alter the interlocutor, in so far as concerns "the findings and decerniture againt the defender, "applicable to the conclusion in the summons, for "27*l.* 14*s.* 2*d.*, as the proportion of the expense of the "common sewer, with the interest thereof, and for the "expenses corresponding to that branch of the discus-"sion; to assoilzie the defender from that conclusion, "as well as from all the other conclusions of the action "and to find him entitled to his expenses for that "branch of the discussion as well as for the rest of his "expenses."

Judgment of Court, 17th Feb. 1833.

Upon considering these reclaiming notes the following interlocutor was pronounced by their Lordships:—"(27th February 1833.)—The Lords having "advised the reclaiming notes for both parties, and "heard counsel for the parties, in respect that the "infeftment in favour of George Nicol does contain "the conditions relative to granting a personal bond, "the expense of erecting the rail and wall round the "centre of Bon Accord Square, the pavement and "the iron-rail fronting the square (which the Lord "Ordinary had been led to believe were not men-"tioned in that infeftment), before answer, recal the "interlocutor reclaimed against, and remit to the Lord "Ordinary to reconsider the cause, and proceed therein "as to him shall seem just."

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The Lord Ordinary thereafter pronounced this interlocutor, to which he added an explanatory note[1]:—"(19th November 1833.)—The Lord Ordinary having "considered the remit from the Court, and the whole "cause, and having again heard counsel for the parties, "Finds, that the defender is not bound to grant to the "pursuer for behoof of the corporation, a personal "obligation for payment of the yearly duties or ground "rents specified in the libel, or for performance of the "clauses and conditions contained in the articles of "roup, or in the burgage disposition granted by John "Finlayson, boxmaster of the corporation, in favour of "George Nicol: Finds, that the defender is not liable "to pay to the pursuers or their successors in office, "the sum of 16*l.* 6*s.* 6¾*d.* with interest, as part of the "expense of erecting the metal railing and dwarf wall "round the centre of Bon Accord Square: Finds, "that the defender is bound to lay the foot pavement "opposite to, and along the sides of the subjects dis-"poned to George Nicol, and to erect an iron railing "at the east end of the said subjects, in conformity "with the provisions in the burgage disposition, and "within the time therein mentioned: Finds that the "defender is not bound to lay the pavement at the west "end of the subjects fronting Bon Accord Terrace, "there being no obligation to that effect in the dis-"position to Nicol: Finds that the defender is liable "to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his "proportion of the expense of erecting a common "sewer, of which he has taken benefit since his pur-"chase from Nicol; assoilzies the defender from all the

[1] See note in 2 S. & M'L. 642.

"other conclusions of the libel, and decerns: Finds "the pursuers liable to the defender in expenses of "process, except in so far as the discussion and proof "regarding the common sewer is concerned: Finds "the defender liable to the pursuers in the expense of "the said discussion and proof, and remits the accounts "thereof, when given in, to the auditor to tax, and to "report."

Statement.

Both parties reclaimed, and the Lords pronounced the following interlocutor on the note for the pursuers:— "(18th December 1834.)—The Lords having advised "this case, and heard counsel, find the pursuers entitled "to interest as libelled, on the sum found due by the "defender for the common sewer. Quoad ultra, refuse "the desire of this reclaiming note, and adhere to the "interlocutor reclaimed against; find the pursuers "liable in additional expenses to the defender in the "proportion specified in the interlocutor reclaimed "against, and when the account shall be given in, "remit to the auditor to tax the same and to "report."

Judgment of Court, 18th Dec. 1834.

Of the same date, their Lordships pronounced the following interlocutor on the reclaiming note for Coutts:—"The Lords having advised this cause, and "heard counsel, refuse the desire of this reclaiming "note, and adhere to the interlocutor reclaimed "against: Find the defender, Adam Coutts, liable to "the pursuers in additional expenses, in the propor- "tion specified in the interlocutor reclaimed against, "and remit the account when given in, to the auditor "to tax the same, and to report."

The incorporation appealed against the interlocutors

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of the Lord Ordinary, of 11th January 1831 and 19th November 1833, and the interlocutor of the Court of 18th December 1834 in so far as unfavourable to them.

The defender also presented a cross appeal to the House of Lords against the Lord Ordinary's interlocutor of 19th November 1833, and the above interlocutors of the Court of 18th December 1834, in so far as they found him liable in 27*l.* 14*s.* 2*d.* and interest, on account of the common sewer, and in the expense of that branch of the discussion.

The House, after considering both appeals, and hearing counsel at great length, pronounced a judgment, upon the 23d May 1837, which, with the opinion then expressed by Lord Brougham on the cause, will be found in the report, in 2 Shaw and M'Lean, p. 609.

The judgment was in these terms:—"It is ordered "by the Lords Spiritual and Temporal in parliament "assembled, That the said cause be remitted back to the "First Division of the Court of Session in Scotland, to "consider and state to this House their opinion upon "the following questions:—

"1st. Are any of the obligations in the feu-charter, "and which of them, of such a nature that they are "binding upon singular successors, without either being "declared real burdens or being fenced by irritancies?

"2d, If any one of the obligations is such that it may "be a real burden without being so declared, is an "irritancy necessary to make it binding upon singular "successors?

"3d, Are any of the obligations, and which of them,

" of such a nature that an irritancy would not make " them binding upon singular successors as real bur- " dens, without words declaring them real burdens?

" 4th, Is there any difference, and what, between the " effect of an irritancy which forfeits the right of the " singular successor only, and one which sends the feu " back to the superior, in making the obligation to " which it is annexed binding upon singular successors?

" And the said First Division of the Court is hereby " required to take the opinion of the Judges of the " other Division of the Court and of the permanent " Lords Ordinary upon these questions, and for this " purpose to direct the printed papers in the cause, " including the printed cases laid before this House, to " be laid before the Judges of the other Division and " the permanent Lords Ordinary, for their opinions in " writing thereupon; and this House does not think " fit to pronounce any judgment upon the said appeals, " until after the whole Judges of the Court of Session, " including the Lords Ordinary, shall have given their " opinion upon the questions hereby referred to their " consideration, according to the directions of this " order."

In terms of the above judgment the papers in the cause were laid before the whole Judges, and thereafter the following opinions were returned.

Lords Gillies, M'Kenzie, Corehouse, and *Jeffrey:* — This case has been remitted by the House of Lords for the purpose of obtaining the opinion of the Court in answer to four questions: — (repeating the questions ad longum).

Before answering these questions, some preliminary

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observations may be useful to explain the grounds of our opinion.

It will be kept in view that the rights of parties in this case do not depend upon a feu-charter, but upon a burgage disposition. It is true that a feu-charter was granted by the Corporation of Tailors to Nicol on the 22d of April 1824, and that he took infeftment upon it on the 29th of May following. But as it was soon discovered that the subject was holden by the corporation in burgage, and that the charter and infeftment were therefore inept, they were superseded, with the consent of parties, by a burgage disposition dated the 9th of September 1825, on which sasine followed. The feu-charter and infeftment have been referred to, not as imposing obligations on the respondent, for in that respect they were unavailing, but as documents to prove that as clerk of the corporation he was acquainted with the intentions of his constituents, and was bound to carry them into effect. If the first investiture had been valid the corporation would have been the superior, and Nicol, the respondent's author, the vassal. Under the second investiture the crown is the superior, and whatever may be the reserved rights of the corporation it is the crown only who can give an entry to vassals, either as heirs or singular successors. The effect of this distinction in some instances will appear in the sequel.

To constitute a real burden or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and those words must be inserted in the sasine which follows on the conveyance, and of conse-

quence appear upon the record. In the next place, the burden or condition must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land, or create a monopoly. The superior, or the party in whose favour it is conceived, must have an interest to enforce it. Lastly, if it consists in the payment of a sum of money, the amount of the sum must be distinctly specified.

If these requisites concur, it is not essential that any voces signatæ or technical form of words should be employed. There is no need of a declaration that the obligation is real, that it is a debitum fundi, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant, which is often of great importance in ascertaining its import. Neither is it necessary that the obligation should be fenced with an irritant clause, and far less with irritant and resolutive clauses; which last are peculiar to a strict entail,—a settlement depending, as will afterwards be explained, upon a different principle altogether.

What has now been stated rests on the authority of Stair, book ii. 3. 54. and 55., book iv. 35. 24., and on that of Bankton, book ii. 5. 25., confirmed by a numerous train of decisions.

Thus, with regard to the form of expression, we may refer to the case of Martin v. Paterson [1], where the Court held, "that without requiring any technical form of

[1] 22d June 1808, Fac. Coll.

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"expression for the constitution of a real lien, it is "necessary that the intention to impose a burden on "land by reservation should be expressed in the most "explicit, precise, and perspicuous manner." At the same time, as just observed, the construction of the words employed will be affected by the nature of the grant. If the condition is one usually attaching to the lands in a feudal or burgage holding,—in particular if it has a tractus futuri temporis, or is of a continuous nature, which cannot be performed and so extinguished by one act of the disponee or his heir, words less clear and specific will suffice to create it than when the burden appears to be of a personal nature; for example, the payment of a sum of money once for all in terms of a family settlement.

To illustrate this distinction, some of the more ordinary feudal prestations in a charter, even though not clearly expressed, are held to be implied in a question with singular successors; and so far is this carried that there is a series of cases in which the Court found that certain urban servitudes with regard to the height and form of buildings, and restrictions as to the ground to be left vacant, were implied conditions of the grant, merely in consequence of the exhibition of the building plan by the superior to his feuars when the feu contracts were entered into: Shultze v. Campbell, 26th November 1813; Young and Co. v. Dewar, 17th November 1814; and many others. It is true that those cases were disregarded by the House of Lords in Gordon v. the New Club, 11th March 1815; but they were so on the principle, that implied restrictions of that nature will not affect singular successors unless they appear on the record. If they enter the investiture, it was ad-

mitted on all hands that they would be effectual as conditions of the grant against all, whether purchasers or creditors, into whose hands the subject might come: accordingly it has been so decided in many subsequent cases. Thus, in a suspension and interdict against a singular successor, Brown v. Burns, 14th May 1823, where there was a condition in the feu right "restraining the "feuar from dealing in trade and merchandize, goods "or vivers, and from baking or brewing for sale, and "the occupation of any handicraft," it was held "that "a superior may introduce conditions which are legal, "and cannot be dispensed with but by his consent." So in Pollock v. Turnbull, 16th January 1827, the Court found that a singular successor in an urban tenement might raise his house by adding a fourth story, because he was a singular successor, and the restriction was not inserted in his charter. When the restriction does appear in the investiture, the Court has uniformly enforced it against singular successors, and that not only in a question with the superior who had granted the right, but with third parties who had obtained a jus quæsitum under it; for example, persons in the same street who had entered into feu contracts on the faith that the restrictions laid upon the other feuars in the street were effectual. It was so decided with regard to a servitude altius non tollendi, Cockburn and others v. Wallace, &c., 1st July 1825.

The same rule holds with regard to all the prædial servitudes, as pasturage, fueling, aqueduct, thirlage, &c. Indeed, those conditions being so frequent and so intimately connected with the nature of a feudal grant, they may be constituted by a writing not entering the investiture, but followed by clear and unequivocal possession.

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Other conditions of a less frequent nature and which do not fall under the description of servitudes, are equally effectual if they appear on the face of the investiture and in the record. Thus an obligation on the vassal in a feu charter, "upon his own proper charges and expenses to keep and uphold a boat of six oars, and to provide the same with six rowers and a steersman, and all things necessary for the usage of the superior and his family, in terms of the former feu charters thereof, and also to keep the mansion-house now built upon the estate wind and water tight," was enforced in a question with the creditors of the vassal.[1] That was not a servitude known in the law of Scotland; indeed it was not a servitude at all, because it consisted in faciendo, not in patiendo, which, with some exceptions, is the criterion of that species of right.

Similar obligations occur in feu-charters, such as the carriage of fuel or of millstones, furnishing poultry, &c., all which being in the investiture attach to singular successors; and a great many others were usual in charters before the 1st of Geo. 1. s. 2. c. 54., which declared personal services illegal, for the preservation of the peace of the country, and with a view to diminish the influence of the Highland chieftains. But all such obligations not struck at by that statute or by the common law, and being consistent with the interest of the community, qualify feudal grants, into whose hands soever the subject comes, either in a question with the superior or the parties for whose benefit the obligation is imposed, or those who have a jus quæsitum under it.

But there is another class of cases, as already men-

[1] Duke of Argyle v. Tarbert's Creditors, 5th Feb. 1762, Mor. 14,495.

tioned, where the words must be much more precise and specific to make the obligation binding on singular successors. Thus, where the disponee is burdened with the payment of a sum of money, whether it be reserved to the superior himself or made payable to a third party, if the amount of the sum is not exactly specified in the investiture, it is unavailing, for the law of Scotland does not admit any indefinite burden attaching to lands. In support of that familiar and long established rule it is unnecessary to refer to authorities. Thus also, if the obligation is to be performed, and so extinguished, by a single act, the presumption is that the granter of the feu-right meant to impose it on the grantee and his heirs exclusively, and not to extend it against singular successors; the case being the reverse of those where the obligation has a continuance and is, comparatively, of little use unless it remains attached to the subject.

Prior to the decision in the House of Lords, Lord Lovat against Lady Lovat, &c., 1st April 1721 [1], which appears to be the leading case on the subject, the Courts in Scotland treated an obligation to pay a sum of money much in the same way as other conditions in a feudal grant, without reference to the distinction alluded to. Since that time, and after some contradictory judgments, it has now been settled that the most specific and precise words are necessary to extend a burden of this nature against singular successors. Voces signatæ need not be employed, but the intention must be as clearly expressed as if it were a condition of a strict entail. In evidence of this we may refer to the case Martin v. Paterson, already cited, in which, although the lands were dis-

[1] D. Robertson, App. p. 355.

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poned "under burden of a sum" distinctly specified, and the sasine was taken "with and under the burdens "before mentioned," it was found that this was a personal and not a real burden. A similar decision had been pronounced in Stewart v. Home, 18th May 1792, and it was repeated in M'Intyre v. Masterton, 3d February 1824. Much more precision, therefore, is requisite in cases of this nature than when the condition is plainly meant to attach to the subject as servitudes or prestations which may from time to time fall due.

At one period it was made a question, whether obligations in feudal grants could be made effectual against singular successors without the protection of an irritant clause; but it is now settled law that no irritant clause is necessary. Lord Stair, as Mr. Bell remarks, entertained no doubt of the efficacy of a clause of pre-emption, or the more sweeping clause de non alienando sine consensu superioris by force of the provision merely. On strict feudal principles they are effectual as conditions of the grant, without a compliance with which the superior is not bound to give an entry to the heir of the vassal. Lord Bankton is equally clear, and almost all the cases which have been referred to are instances in which conditions have been enforced without the aid of irritancies. Mr. Erskine's doctrine to the contrary rests entirely on the case of Stirling v. Johnston, 29th December 1756, to which he refers, but it is believed there is not a case reported in the books so objectionable in every particular. It was a clause of pre-emption in favour of the superior occurring in the charter but not in the infeftment of the vassal. Lord Kames, the Ordinary, annulled the right of a purchaser in contravention of this clause on the ground of mala fides on his

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part, because it was admitted that he knew of the condition, but, as Kilkerran remarks, "the answer to this "was, that as he knew of the condition, so he also "knew that it was ineffectual in law." The Court altered the Ordinary's interlocutor, and supported the right of the purchaser, not on the clear and unanswerable ground that the condition was not in the investiture, which was the only legal certioration to the purchaser, for they held, that being in the charter it was in eodem corpore juris with the infeftment, forgetting entirely that the charter does not enter the record, while the infeftment does. The ground they took was, that the condition was not fenced with an irritant clause, a ground for which not a single authority or decision in the law of Scotland can be quoted; and they confounded the case with that of an absolute prohibition to alienate in a strict entail, to enforce which not only an irritant but a resolutive clause is necessary under the statute 1685. Mr. Erskine, misled by this single decision, cannot be considered as an authority upon the point; and this is the opinion of Mr. Ivory in his note on the passage, and of Mr. Bell in his commentaries. They are fully confirmed by what fell from the Court in Sir Robert Preston against Lord Dundonald's Creditors[1], and what was then stated to have been the opinions of the Lord Justice Clerks Miller and M'Queen.

It may be proper here to advert to the distinction between an irritancy fencing the condition of a feudal grant, and the irritant and resolutive clauses necessary to enforce the prohibitions of a strict entail. This is well explained by Lord Stair:—"It is much debated

[1] 6th March 1805, Fac. Coll.

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" among the feudalists about clauses de non alienando, " with an irritancy or resolutive clause, or that the fiars " should contract no debt by which the fee might be " alienated or the tailzie changed, and they are gene- " rally for the negative, that clauses prohibiting con- " tracting of debt, or simply not to alienate, are incon- " sistent with property, albeit they may be effectual if " so qualified that no alienation be made or debt con- " tracted to affect the fee or alter the succession, with- " out the consent of the superior or such other persons; " but that being absolute, they cannot be effectual " against singular successors; whereas those limited " prohibitions resolve but in interdictions, and being " contained in the seisins registrate they are equivalent " to interdictions published and registrate."

The principle is this: both by the civil and feudal law the power of disposal is considered as of the very essence of the right of dominion, and no person being proprietor can be prohibited absolutely from alienating his property or contracting debt to affect it. To reconcile this doctrine with the anxiety of proprietors in Scotland to perpetuate their estates in their families, irritant and resolutive clauses were invented or adopted about the commencement of the seventeenth century, and were considered at the time a very astute and subtle device to attain the object in view. The ground on which they proceed is, that the act of alienation infers a forfeiture of the proprietor's right, and the forfeiture is feigned to operate retro, so that he ceased to be proprietor before the act was consummated, and therefore it was null, as flowing a non habente potestatem. Perhaps there was never a more clumsy fiction introduced into law, one which has produced more anomalous and inconsistent

decisions, or given rise to such interminable litigation. But, as Lord Stair observes in the passage quoted, those irritant and resolutive clauses apply only to the case of an absolute prohibition to alienate. Where the prohibition is qualified, it may be enforced as a legitimate condition of the feudal grant by the ordinary legal remedies. Thus the clause de non alienando sine consensu superioris, which was very frequent in his time, took effect without an irritancy, as already observed; and so the law was held to be settled till the 1st of Geo. 2., by which that prohibition was rendered illegal. This subject is more fully treated by Mr. Bell, and by Mr. Brodie in his note on the passage of Stair above quoted.

It may therefore be considered as undoubted law, that if a condition in a feudal grant is conceived in terms to make it real, and is not objectionable on any other ground, no irritant clause is necessary to give it effect against singular successors. If it is clearly personal, or exposed to objections, an irritant clause will not support it.

But an irritancy is often found adjected to those conditions for various reasons. It gives a readier and more powerful remedy in case of contravention. Thus, in the present grant there is an obligation on the vassal to erect houses of a certain description on the subject. In case of failure a penalty of 100*l.* is stipulated, and that condition might be enforced in an ordinary action. But as the pursuers of the action might be involved in a question as to the amount of damages which they sustained by the failure, penalties being restricted in a court of equity to the actual loss sustained, a clause of irritancy, as in this case, is added, providing that the vassal, besides the penalty, "shall also lose all right and

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"title to said piece of ground, which in that event shall "revert to and become the property of said trade." This is more stringent and effectual, for it could not be evaded except by purging before decree of declarator.

The statute 1597, c. 246. enacted, that all vassals by feu farm, failing to pay their feu duty for two years together, shall lose their right in the same manner as if an irritant clause had been specially engrossed in their charters. Notwithstanding this irritancy by statute, it was the practice to introduce an irritant clause in the charter, with the view of preventing the vassal from purging before declarator: for it was held, that although legal irritancies might be purged, conventional irritancies could not. The same practice continues still, although the distinction between legal and conventional irritancies no longer obtains, and when there is therefore no use for the provision. In the present case the irritant clause in the event of the duties not being paid is extremely proper; for the statute 1597 expressly applies only to vassals by feu farm, and it is very doubtful whether it could be extended to the duties here, which are not feu duties, but ground annuals only, not payable to the superior, but to the granter of the burgage right.

Clauses irritant, therefore, though not necessary to enforce real conditions against singular successors, are sometimes useful for the reason mentioned, and on that account retained. Occasionally they serve another purpose, for, although they will not make a condition real which by its own nature is not so, they may afford the means of construing a condition, the import of which would otherwise be doubtful. If the granter fences a condition with an irritant clause, it is one reason for pre-

suming that he meant it not only to apply to the grantee and his heirs, but to singular successors also. A clause of irritancy, in the case of Martin v. Paterson above quoted, would not have rendered the burden real, because it was of a personal character, and the words used were plainly defective. But cases may be figured, in which the presumption arising from such a clause might be material in judging of the question, personal or real.

It has been said, that the condition in a feudal grant must not only appear from clear expression or plain inference to have been intended by the parties to be real, but it also must be such as the law will support. It must not fall under any express prohibition introduced by statute or consuetudinary law. It must not be contra bonos mores; and it must not be contrary to public policy. It was an early condition in feudal grants, that all the vassals should grind their corn at the superior's mill, and pay a certain rate of multure for that service; or where the thirlage was strict, they were bound to pay not only for all the corn ground, but for all the corn grown upon their feu, seed and horse corn excepted. That custom, which was introduced when the erection of machinery was difficult, and therefore for the benefit of the district, has been perpetuated long after the reason ceased, and thirlage still subsists as one of the known and legal servitudes in the law of Scotland. Two centuries ago there were other restrictions of a similar nature. Thus, it was often a condition in a feu charter that the vassal should bring all his malt to the superior's brewery to be made into ale, and to have all his iron-work manufactured at the superior's smithy. These conditions have fallen into

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disuse, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy; for it would be a plain injury to the community, if the proprietor of a piece of land could not employ the brewer or the smith most convenient for himself, or whose work he most approved. Such a restriction, while it was of little advantage to the superior, would greatly diminish the value of the lands. Accordingly in the case of Yeaman v. Crauford[1], in which the sheriff "sustained the astriction of certain lands to the smithy "of the barony for the manufacture of the iron-work "belonging to their husbandry," the Court passed a bill of advocation; and it is believed the case was carried no farther.

An important case of this nature is mentioned in the speech of the noble and learned Lord who moved the judgment in the House of Lords. It is that of Campbell v. Harley[2], where the superior feued the subject under a condition that all dispositions of the lands, with the infeftments upon them, should be prepared by his own agent; otherwise to be null and void. In a reduction by the superior of a disposition made by the vassal in contravention of this clause, the Court were much divided. The majority held that the condition was neither prohibited by law nor contra bonos mores, that it was not inconvenient for the public, and might be useful to the superior, and therefore they supported the condition, and reduced the disposition. The minority, on the other hand, observed, that the estate was feued under act of parliament, which required the highest feu duty to be

[1] 18th Dec. 1770, Mor. 14,537. [2] 1 W. & S. 690.

received, and yet this condition had a direct tendency to lower the value of the subject feued, and of course the feu duty; and that it is a clause unnecessary to the superior's protection, dangerous and prejudicial, and therefore vexatious, and also illegal by 1592, c. 140. as against law, equity, and reason; and that it is inconsistent with the 20 Geo. 2. c. 50. They said that this condition was of the same nature as if it had been stipulated that the vassal should always come to Glasgow by a particular coach, or should employ a butcher, tailor, baker, or doctor, to be named by the superior. If the vassal was obliged to employ the superior's agent in framing all conveyances and other titles relative to the property, he might, on the same footing, be bound to employ the superior's counsel in all lawsuits relating to it. Monopolies of this nature are quite inconsistent with the policy of the law, and it is the duty of the Court not to enforce them. Reference might have been made to the case of Yeaman, already cited, where, notwithstanding an ancient usage of astricting the vassals to the superior's smithy, the Court refused to confirm a judgment of the sheriff giving effect to that condition. If the vassal cannot be bound to employ the superior's smith, why should he be bound to employ the superior's law agent? The cause never came to a judgment after a remit from the House of Lords; and it is believed the superior discovered that the condition was exceedingly injurious to himself, and of no advantage to any one but his agent.

This case has been stated at length, because, if the condition was neither illegal nor contrary to public policy, and if the superior had an interest to enforce it, no judge, it is thought, would have entertained a doubt

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that it was in terms sufficient to constitute a real right, and that the clause of irritancy annexed to it was unnecessary to give it effect. The opinion of the minority proceeded entirely on the ground that the condition was of a nature which the superior was not entitled to introduce into his charter. In particular we are authorized to state, that the opinion of Lord Gillies, who voted with the minority, did not rest upon the ground that a resolutive clause was wanting, such a clause being quite inapplicable to a grant of this description.

We have said that one of the requisites to make conditions in feudal grants effectual is an interest on the part of the superior that they shall be enforced. This is illustrated by the case of Campbell v. Harley, just quoted; and the objection appears in a more simple form in Brown v. Burns.[1] In that case, as formerly mentioned, there was a condition in the feu right, "restraining the feuar from dealing in trade, in mer-"chandize, goods or vivers, and from baking or brew-"ing for sale, and the occupation of any handicraft." It was held, "that in enforcing such clauses there must "be an interest, and no emulatio vicini; and here the "street being full of shops there is no interest."

There are two clauses not unfrequent in feu charters, to which it may be proper to advert, though neither of them occurs in this case. One is the clause of pre-emption; that is an obligation on the vassal, if he sells the lands, to prefer the superior to others who do not offer a higher price. It is not yet fixed in our law whether that clause falls under the statute 1st Geo. 2., which prohibits the superior to stipulate that lands shall

[1] Supra, p. 309.

not be sold without his consent. In Stirling v. Johnston[1], it seems to have been taken for granted, though there was no decision on that point, that the clause was illegal. In the next case, Irving v. the Marquis of Annandale[2], the reverse was held. Some stress was laid in that case, in the pleadings at the bar, on the presence of a resolutive clause; but the decision did not turn on that point, and it was plainly immaterial. Afterwards, in Farquharson v. Keay[3], the clause of pre-emption was found ineffectual, exclusively on the statute. In Preston v. Dundonald's creditors, 6th March 1805, the question came under consideration again; but the judgment turned on a specialty, namely, that the vassal was not infeft, and the interlocutor contained an express declaration that it was unnecessary to decide the general point. The validity of a clause of pre-emption, therefore, still remains matter of doubt; but if it be valid and aptly expressed, it will unquestionably be good against singular successors, and no irritant clause will be necessary to enforce it. In a feu charter the simplest and best mode of proceeding for that purpose, is by the superior refusing an entry to the purchaser. But that method could not have been followed, if there had been a clause of pre-emption in this case in favour of the appellants, for they are not the respondent's superiors, and have no right to give or withhold an entry to him or his disponees. A clause of irritancy, therefore, would probably have been resorted to.

There is often a prohibition in feu rights against subinfeudation. It would be incompetent and inept in a

[1] Supra, p. 312.
[2] 6th March 1767, Mor. 2343.
[3] 2d Dec. 1800, Mor. App. 1, vo. Clause, no. 3.

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burgage holding, such as this. The common mode of enforcing it, as in the preceding case, is by withholding an entry; but we have no doubt that it might also be the ground of an action of reduction, if the superior could show an interest (which it would be difficult for him to do) to proceed in that manner.

We now proceed to answer the questions in their order.

I. We are required to say, "Are any of the obligations of the feu-charter, and which of them, of such a "nature that they are binding upon singular successors, without being declared real burdens, or being "fenced with irritancies?" It has been mentioned that there is no feu-charter here. The obligations are contained in a burgage disposition. It is proper farther to observe, that the question is not whether these obligations, in the circumstances of this case, and under the present summons and record, can be enforced against the respondent, but whether they are of such a nature that they are binding upon singular successors, without being declared real burdens or fenced with irritancies. Considering them, therefore, abstractedly as conditions inserted in a feudal grant, we shall examine them in their order.

1. It is a condition of the grant that the disponee and his heirs and assignees shall, within a certain time, erect houses upon the subject of a certain description, and the condition is fenced with a penalty and an irritant clause. There is no doubt that this obligation is of such a nature as to be binding upon singular successors, although it is not declared in express terms to be a real burden, and although it had not been fenced with an irritancy. It is a condition extremely common in feu-

rights, granted for the purpose of building; its validity was never doubted, and it is daily enforced. We may observe, in passing, that the irritancy with which it is fenced to a certain extent is not valid, and would be ineffectual both against the first vassal and his singular successors; for it is stipulated that the appellant shall have power to use and dispose of the subject in the event of failure, without raising any process to that effect, that is, without process of declarator of irritancy, for that is not consistent with law as at present settled. The irritancy, in so far as it is legal, is beneficial to the granters, but the want of it would not affect the reality of the burden.

2. There is an obligation on the disponee to erect an iron railing eight feet from the houses, an obligation to carry off the eaves-drop, servitudes tigni immittendi et oneris ferendi in favour of the adjoining feuars, and an obligation to lay a foot pavement opposite to and along the sides of the feu. All these are manifestly, from their nature, real burdens, though neither declared to be so in express terms nor fenced with irritancies, having all the requisites mentioned above to render them effectual as such.

3. There is a condition that the vassal shall pay a proportion of two third parts of the expense of forming and enclosing the area in the middle of the square, and of upholding it in complete repair. That is not a real burden, for it is an obligation to pay an indefinite sum of money, which cannot be imposed by the law of Scotland. On this point it may be proper to explain, that an obligation ad factum præstandum may be enforced, and is so every day, though indirectly and practically it

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may resolve into payment of an indefinite sum. Thus it is one of the usual mill services, that the vassals of the sucken shall bring home mill-stones when required, and clear out the aqueduct when it becomes filled with mud and rubbish. This, in general, can only be done by hiring labourers to perform the work, whose wages the vassals pay, in proportion to the extent of their feus or the nature of their thirlage. But these obligations are unquestionably real burdens, because the fact to be performed is in itself specific, whatever means the vassal may resort to for his own convenience in accomplishing it. There is accordingly a finding in the interlocutor proceeding on that familiar distinction. An obligation to pay a proportion of the expense of keeping certain wells in repair is of the same nature.

4. There is a prohibition to tan leather, to refine tallow, to make candles, to slaughter cattle, and various other nuisances, which, laying out of view the circumstances of this particular case, are all of a nature to bind singular successors, without being declared in express terms to be real burdens, or fenced with irritancies, because they are lawful conditions of the grant.

5. The next obligation is to pay 18*l.* 2*s.* 6*d.* per annum as ground-rent, which, though not a feu-duty, is in some respects of the same nature; and it is properly fenced with an irritancy, which would have been useless in a feu-right, because it may not have the benefit of the statute 1597, this being a burgage-holding. There is a declaration that the ground rents shall be real burdens, affecting the ground and the houses built upon it. That, however, is not for the purpose of transmitting the obligation against singular successors,

but to explain that the disponee shall have the benefit of real diligence against the tenants and possessors of the subject for his own relief.

The last condition is of more doubtful effect than any of the rest. It is provided, "that the said George "Nicol, and all succeeding heirs and singular successors "to him in said piece of ground, shall be obliged, "within six months after their acquiring right thereto, "to grant, upon their own expenses, personal obliga- "tions for payment of said duties or ground-rents, and "performance of the whole clauses and conditions pre- "stable by them therein contained, and that without "prejudice of the real right competent to the said John "Finlason and his foresaids in virtue of said disposition, "and of this infeftment thereon." There is no doubt that parties intended this to be a real burden, and to attach upon singular successors, for so it is expressly declared, but whether the law will sanction such a burden is a different question. Certainly, as is admitted, it could not oblige singular successors to grant a personal bond for the performance of conditions which were not or could not be made real burdens in the grant. In the next place, it rather appears to be a condition inconsistent with public policy, vexatious to the vassal, and an obstacle to the free commerce of land, because it ousts him of many advantages which he would otherwise enjoy at common law. When real burdens are enforced against him in the ordinary manner,—for example, if he is required to build a house, to lay a pavement, to inclose an area, and so forth, within a limited time,—and if he fails to do so within the time specified, the irritancy cannot be declared until the ordinary inducise of a summons have run, and until

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defences have been stated, and decree of declarator obtained and extracted. But if he has granted a personal bond to do these things, he may be charged on letters of horning at six days date, and could not obtain suspension without finding caution perhaps to a great amount. Keeping this in view, and also that such clauses are extremely rare, and, as far as it appears, have neither authority nor decision in their support, we doubt whether they might not be considered in the same light as the clause in Campbell of Blythwood's charters[1] was by the minority of the Court; an opinion which received countenance in the House of Lords, both when the remit was made, and when the judgment in this case was moved. If it be a legal and warrantable condition in any case, it seems to be so in regard to feu-duties or ground-rents, the precise amount of which is liquidated in the charter or disposition, and for withholding payment of which there can scarcely even be an excuse.

II. The second question is, "If any one of the obli-"gations is such as to be a real burden, without being "so declared, is the irritancy necessary to make it "binding upon singular successors?"

This question appears to involve its own answer. If an obligation in a feu or burgage right is real, it binds singular successors; if it does not bind them it is not real, but personal. An irritancy is often a convenient mode of enforcing a real burden, but not necessary to constitute it, except, as has been explained, in the case of strict tailzies, with which at present we have nothing to do.

[1] Campbell v. Harley, supra, 318.

III. The third question is, "Are any of the obligations, and which of them, of such a nature that the irritancy would not make them binding upon singular successors as real burdens, without words declaring them real burdens?"

An irritancy will not make a personal burden real, although, when the words are otherwise not sufficiently precise, it may be of use to explain the intention of parties. For example, in the case of Martin v. Paterson, no irritancy would have made the payment of the sum mentioned in the infeftment a burden upon singular successors, the Court holding the words employed not sufficiently clear: but they might have taken it into view in construing those words. Thus, in Cumming v. Johnston, or Canham v. Adamson [1], a case mentioned when the judgment was moved, the disponee of a burgage tenement was burdened with the payment of a specific sum to a creditor of the disponer, and the Court at first found that the creditor had only a personal right. There was an irritant clause in the disposition, but it was not repeated in the infeftment, and therefore absolutely unavailing against singular successors. But as the burden itself, though without the irritancy, appeared in the infeftment, they afterwards sustained it as real. This judgment perhaps went too far, according to our present notions of the law, and it can only be justified by giving the irritant clause the effect which has among other circumstances been mentioned, that of being an element of construction.

IV. Fourthly, it is asked, "Is there any difference, and what, between the effect of an irritancy which

[1] 7th Nov. 1666, Mor. 10234 & 2727.

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"forfeits the right of the singular successor only, and "one which gives the feu back to the superior, in "making the obligation to which it is annexed binding "upon singular successors?"

An irritancy cannot be declared against a singular successor without giving back the subject to some person. In feu rights the subject reverts to the superior or his heirs. In burgage holdings it reverts not to the superior, who is the sovereign, but to the granter of the burgage disposition. In strict entails, when an irritancy is declared the contravener is struck out of the desti nation, and the fee descends to the heirs of his body, if the forfeiture is not directed against them, and if so, to the next heir in the destination after the contravener. We are of opinion that there is no difference between the fee returning to the superior in a feu or to the disponer in burgage, in making the obligation to which it is annexed binding upon singular successors. If there was a condition either in a feu or burgage right, of which we never saw an example, that the subject, when the right of the granter is irritated, should go to some third party otherwise unconnected with the feudal or burgage contract, we cannot see how this should affect the quality of the right in the person of the singular successor. A fee forfeited, and reverting to nobody, is altogether anomalous.

With a view to save further expense, in a case which has already cost the parties much more than the value of the matter in dispute, two further explanations may be given.

1. The first interlocutor of the Ordinary, which, on a remit, he saw cause to alter, proceeded upon this ground. There were specialties in the case which seemed of im-

portance. Some of the conditions were protected by clauses of irritancy, and others, where it would have been equally useful, were not so protected. Again, there was an obligation to engross all the conditions in Nicol the first vassal's infeftment, but there was no obligation to engross them in any future conveyance or investiture. This singular omission appeared to raise the presumption, that parties intended that one set of the conditions at least should be personal, binding Nicol and his heirs exclusively. But, upon reconsideration, as the words employed expressed conditions naturally attaching to land, and were such as usually occur in urban tenements, he came to be of opinion that the presumption arising from these specialties, in not a very skilful conveyance, ought to be disregarded.

2. Many of the conditions, which from their nature appeared to be real, are not enforced in consequence of the shape of the summons and the proceedings of the parties. The summons contains five petitory conclusions only, and one declaratory conclusion.[1] With regard to the petitory conclusions referring to five conditions, four are sufficiently precise, and the grounds upon which they rest are set forth in explicit terms. They have therefore been articulately disposed of by the interlocutor. There are no petitory conclusions with regard to the remaining conditions of the grant. On the contrary, the pursuers have pleaded, "that they have no "occasion in the present action to enforce them." The declaratory conclusion, however, stands in a different situation. It bears, that the Court should find and declare, that "the whole foresaid obligations, stipula-

[1] See conclusions of the summons, 2 Sh. & M'Le., 635-637.

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" tions, provisions, conditions, and declarations con-
" tained in the said articles of roup, and in the said
" feu charter granted by the said John Keith, and in
" the said disposition granted by the said John Fin-
" lason, both in favour of the said George Nicol and
" above quoted, attach and apply to and are binding
" upon the said Adam Coutts, as disponee of the said
" George Nicol, and upon his heirs and successors."
This sweeping conclusion rested and could rest solely on the ground, that the respondent being clerk to the corporation had acted fraudulently, or from gross and culpable negligence, in omitting to render all the conditions contained in these documents binding upon singular successors, and therefore that he was barred personali exceptione from pleading that they were not binding. When the charge of fraud and negligence was repelled, the declaratory conclusion in that shape fell to the ground. In the character merely of a singular successor, the respondent had no concern whatever with the conditions in the articles of roup, or in the inept feu charter, or those which had not been engrossed in Nicol's investiture, all of which, however, were libelled upon. If the pursuers, giving up that medium concludendi altogether, had wished a decree to declare the reality of the conditions inserted in the burgage disposition and sasine alone, independently of the plea of fraud and negligence, they should have set forth specifically those conditions, and rested their plea upon the burgage disposition. Further, they should have excepted from that part of their libel all the conditions which had been previously implemented, and those as to which waiver was alleged, or at least they should have made that restriction in their condescendence.

Thus, with regard to the condition about nuisances, waiver was expressly pleaded; for the respondent averred, that "the trade had previously admitted nui- "sances in the case of Dempster and many others, in "feus close adjoining." That was held a relevant defence in the case of Brown v. Burns[1]; but in this case it was neither admitted nor denied by the pursuers with sufficient precision, nor did they join issue with the defender, or take any proof upon the subject, although a proof in very general terms was allowed. But under the judicature act, 6 Geo. 4. c. 120., it is provided, that "the pursuer or pursuers shall in the summons set "forth in explicit terms the nature, extent, and grounds "of the complaint or cause of action, and the conclu- "sions which, according to the form of the particular "action, the said pursuer or pursuers shall by the law "and practice of Scotland be entitled to deduce there- "from." This provision was not complied with, and it was supposed to be the duty of the judge to pick out some one or other condition from the multitude of the conditions libelled, and to support it on some one or other of the various grounds upon which the action was laid. In the same manner, in the first petitory conclusion, the defender is required to grant a personal obligation for the ground rents, and for performance of the whole clauses and conditions contained in the articles of roup, feu charter, and burgage disposition. That might have been a good conclusion on the medium of the respondent's fraud or negligence; but if the appellants proceeded on a different medium, namely, the reality of the condition, they should have restricted this

[1] Supra, p. 30.

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conclusion to the burdens contained in the burgage disposition alone, to such of those burdens as had entered the infeftment, to such as by their nature were real, and to such as had not been implemented or waived, or the restriction should have been made in the condescendence, and a proof demanded of the facts, if disputed. This conclusion, therefore, as it stands, was defective in form under the judicature act, and the defect was not afterwards remedied in the condescendence. It was upon these grounds that there was an absolvitor from the declaratory and the first petitory conclusion. If the appellants had required it, a reservation would have been inserted to enable them to sue in a more correct form. But no such reservation was asked from the Lord Ordinary, neither was it asked when his interlocutor was reviewed by the Court. It may still be inserted in the House of Lords, if desired by the appellants.

Lord Moncreiff.—I think that the whole matter embraced by the remit of the House of Lords is well explained in the above opinion, and I concur therein.

Lord Medwyn.—I concur in this opinion, with this explanation, that I do not think the principle which prevents the obligation in a disposition to a real subject to pay an indefinite sum of money, being more than personal, or binding on a singular successor, applies to the obligation in a burgage disposition or building feu-charter, to pay two thirds of the expense of forming and inclosing the area of the square, and of repairing and keeping it up. The expense is indeed indefinite, but it is as precise as its nature will admit, and it is not unlimited; it never can exceed the limited proportion of the actual expense, and it is a natural obligation in such a deed, as

much as building according to a plan or any other facta præstanda connected with such a feu; it is, in fact, the equivalent or commutation for an obligation ad factum præstandum, and in this respect is quite different from a condition which converts the feu-charter or burgage holding into a security for a loan of money, which is not one of the naturalia of the right. An obligation to pay the stipend belonging to other lands, although the amount cannot be specified, (Johnston v. Ramsay, 20th November 1824,) has been sustained against a singular successor, when properly constituted a real burden; and I think this obligation as to the expense of keeping up the area of the square will always affect the purchaser of the house, and that the superior or other proprietors will have no occasion to look after the heirs of the original feuar, who may have ceased to have any concern with the subject, and claim the amount from them.

The Lord President and *Lord Cockburn* agreed with Lord Medwyn.

Lord Meadowbank.—I concur in the opinion of the other Judges and the preceding addition.

The Lord Justice Clerk.—I concur also in this opinion, but have the same doubt as that expressed by Lord Medwyn, and am disposed to hold that the stipulation as to payment of two-thirds of the expense attending the enclosure of the area of the square is effectual.

Lord Glenlee.—I concur in the foregoing opinion, but at the same time I think what is stated by Lord Medwyn deserves great attention. I am not aware of any precise judgment hitherto pronounced on the point stated by his Lordship, and I do not think it quite clear that the considerations which led the Court, after various contradictory decisions, to establish the general rule, that

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where the burden consists in payment of a sum of money the sum must be exactly and precisely specified, necessarily apply to the case in question.

Lords Fullerton and *Cuninghame*.—While we entirely concur in the exposition given in Lord Corehouse's opinion[1], of the general principles by which questions similar to the present are to be determined, we must be permitted to doubt how far the application of those principles does in some particulars warrant the special conclusions there arrived at.

In the first place, we agree with Lord Medwyn, that the obligation to pay a certain "proportion of the "expense of inclosing the area," &c. does constitute a burden effectual against singular successors in the title of an urban property like the present. It seems to us merely the pecuniary commutation of an obligation, which, if expressed in the form of an obligation ad factum præstandum, would have been perfectly good, agreeably to those general principles on which various others have been supported. It would be difficult to distinguish it from the obligations to erect an iron railway or to lay a foot pavement, except in the immaterial circumstance that the latter are imposed on the disponee singly, while the former is imposed on him jointly with the other burgage tenants.

Still less does it differ from such an obligation as that which was sustained in the case of the Duke of Argyle against the creditors of Tarbert[1], "to keep and uphold a "boat with six oars," &c.

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[1] The opinion of Lord Gillies and others, understood to have been drawn by Lord Corehouse.

[2] Supra, p. 510.

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Secondly, we have great difficulty in holding that the obligation on George Nicol, his heirs and singular successors, to grant personal obligations, for the performance of such of the clauses and conditions as are in themselves real burdens, is objectionable and ineffective. It is framed in terms which seem to be sufficient to render it real, and it does not appear to us to involve any thing either inconsistent with public policy or even prejudicial to the private interest of the parties. It does no more than bind each singular successor to undertake, in the form of a personal obligation, that which ex hypothesi is already a real burden, and of which consequently he has, by taking the lands, contemplated the performance; and its only effect is to place the singular successors in the same situation as the original acquirer of the right.

The stipulation is certainly unusual, and we therefore give this opinion with some diffidence; but, advised as we are at present, we are not prepared to hold it to be ineffectual.

The foregoing opinions having been laid before the House, their Lordships appointed the cause to be argued by one counsel of a side as to their import; and, after argument, judgment was deferred.

Ld. Brougham's Speech.

Lord Brougham.—My Lords. In this case your Lordships have had the very great assistance of the learned judges in the Court below; for the answers which they have given to the questions put by your Lordships three years ago, certainly are most able, learned, and elaborate, and are calculated to give the greatest assistance to your Lordships in the disposing

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of this cause. I shall certainly recommend to your Lordships to take further time in considering their answers, as they raise some very important questions, not only with respect to those matters sent down originally, but also a new question, not only highly material in this case, but which must be of great importance also in general practice.

Judgment deferred.

Lord Brougham.—It is first necessary to dispose of the objection raised upon the pleadings; and when examined this appears to be untenable to the extent at least to which it is pushed. There are two declaratory conclusions, one applicable to the respondent in his capacity of agent or clerk of the corporation, and the other applicable to him merely as a singular successor. These are kept separate and distinct in express terms both in the subsumption and in the conclusions of the summons. "That the said A. Coutts is further and "separately bound to implement in consequence of "having been clerk and professional agent," is the language of the subsumption; and the conclusion follows it, desiring to have it further declared "that A. Coutts "is further and separately bound to implement in "consequence of having been clerk and professional "agent."

This averment in the one part of the summons and the demand in the other immediately follow the averment and demand relating to A. Coutts as disponee of G. Nicol. It is true they do not ask to have each of the obligations declared burdens, nor do they ask that the whole or some should be so declared, but they ask that the whole should be declared; and it cannot be

contended that this does not entitle them to a declaration in part, though they have not said "the whole "or some part thereof." If, indeed, there had only been one conclusion, and that resting solely, as the opinion in the Court below seems to assume, on the personal liability of the party in respect of his employment as agent,—if that ground were disallowed as to one, it must fail as to all; consequently no declaration could be given upon the burdens which might affect him as singular successor.

But in another view, also taken below, though inconveniently mixed up with the former, there is a serious objection to the frame of the declaratory conclusion: it has no particularity whatever. The whole conditions are libelled equally and in a mass, as well those which had been engrossed in G. Nicol's investiture, as those with which a singular successor had nothing to do; for example, the articles of roup and the inept feu charter, as well those which had been implemented as those which remained unperformed. And although the conclusion only asks a declaration upon the latter (those not implemented), yet it was the duty of the party to specify what these were, and not leave the Court (as the learned judges observe) to pick out from the multitude some one capable of supporting the conclusions. The judicature act, 6 Geo. 4. c. 120. s. 2., expressly requires "that the nature, extent, and "grounds of the complaint or cause of action be set "forth in explicit terms in the summons, and the con-"clusions to be deduced therefrom." In strictness, perhaps, we should require each conclusion to be applied to the ground on which it is rested; but it may be admitted that if in the subsumption there is a specified

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statement of different grounds, declaratory and petitory conclusions may be applied to those grounds severally. Thus, although it will not do to recite the whole set of instruments containing many obligations, — some applicable to the party charged, and some inapplicable, some on which the pursuer proceeds, others on which he makes no claim,—and then to demand a declaration on the whole so far as they may be unperformed, yet he may select those on which he claims both declaratory findings and decretal orders (answering to his declaratory and petitory conclusions); and if his declaratory conclusion be good in other respects, it will entitle him to a declaratory finding, although it does not in terms ask it upon the particular matter, but only upon the whole, and although it does not distinguish which of the two declaratory conclusions is applicable to the several obligations, but asks for a declaration against the defender in both capacities as to the whole obligations.

The demand, on the whole, here must fairly be taken to mean either the whole of the preceding particulars or part of them. Certainly, unless some authority is shown for holding the rule more tight, for imposing a more strict construction upon the requisition of the statute, we cannot safely require greater precision. If we did, it would only drive the pleader to repeat each condition or obligation in the subsumption and in each conclusion, where, as here, there are more than one; and thus little would be gained, unless indeed we were to hold, as the Court below seems to do, that where the whole is asked, and any one fails, the whole must fail; in which, as already observed, it seems impossible to agree.

It may also be remarked, that the learned judges

themselves regarded the provisions of the statute as not excluding a somewhat lax interpretation, for, although "summons" only is mentioned in the second section, they assume that the defect of generality in the summons might have been cured by the greater particularity of the condescendence. I therefore am of opinion, that there is nothing in the frame of this summons to prevent the pursuers' having a declaratory finding upon any of the conclusions which are specially averred in the subsumption to be binding on the defender, without specifying in what capacity; but that they have no right to a declaratory finding upon any of the other obligations not specified as binding in any part of the summons, and being referred to in the mass of disputed articles of roup and feu charter.

The question of pleading, therefore, being disposed of, the merits remain to be considered as now before your Lordships on the remit; and the doubts raised on these by the opinions of the learned judges refer, first, to the payment of the two thirds of making and repairing the square, and, secondly, to the granting personal obligations for paying the duties and performing the clauses and conditions. On the last of these points I think it would not be right to deviate from what appears to be the opinion of nearly the whole of the learned judges, and what is consistent with the view taken both in the Blytheswood case[1] when it was before your Lordships and in 1837, when the present case was sent back; namely, that such an obligation is ineffectual, although intended by the words of the conveyance to be made a real burden. On the former I have much more hesi-

[1] Campbell v. Harley, ut sup. 318.

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tation, but I have come to the opinion of those who hold it not to affect the party. Here the conveyance does not declare it a real burden; there is nothing to show (in the words of the learned judges) "that the "subject itself is meant to be affected," and it is not one of the necessary or natural burdens of such rights. It is not "ad factum præstandum," at least not directly or immediately, but only to pay a proportion of the expense occasioned by a certain fact, if done. It is an obligation to bear an unascertained expense, that is, an unascertained sum of money, which it is on all hands agreed cannot be imposed; and it by no means follows, that because the property might have been burdened with the whole inclosures and repairs of the square, therefore it may be burdened with relieving those who shall inclose and repair,—relieving them to a certain extent of the sums required for that purpose. On the contrary, such an obligation would really be converting the feu charter, and in this case the burgage holding, into a security for an amount,—and an undefined amount of money.

In a matter confessedly of some nicety, and on which I have had great doubts, it seems the safe course to consider this obligation as it directly and apparently is,—an obligation to pay an indefinite sum, unconnected with the naturalia of the right. The obligation to pay the expense or any proportion of the expense of repairing, immediately connected with the subject granted, would clearly stand in a different predicament. In the case referred to below, Johnstone v. Ramsay, 20th May 1824[1], the obligation was a warrandice of teinds against

[1] 3 S. & D. 33.

stipend expressly declared to be a real burden in the seisin; and the learned judges have not said in the present case that an obligation, such as the present, can be effectual against singular successors when not declared a real burden, and when the obligation is not to a feudal superior, but to the grantor of the right, when there is no feu holding.

The course which I in the outset showed, must be taken, as the objection to the pleadings confines the pursuers' right to a declaratory finding within the limits of the obligation specified as binding on the defender in the subsumption, where alone (except in the repetition of the petitory conclusions) there is in this case any specification. And, from what has now been said on the merits, it likewise appears that only one declaratory finding for the pursuer respecting those specified obligations remains to be added to the interlocutor; that, namely, which relates to the foot pavement and iron railing at the east end of the premises. To this declaration it seems clear that they are entitled, although in all probability the mere finding in the interlocutor, with the decerniture against the defender, would be sufficient for the purpose; and it is material, with a view to the question of costs, that we should bear in mind how very trifling this alteration of the interlocutor is. The only difference made is, that the interlocutor found the defender bound to do the thing in question; and to this we now add a declaration, that it is a real burden upon the property binding on him as a singular successor.

As this House does not itself declare rights, a remit pro formâ will be necessary to decern and declare in terms of the findings against the respondent, and the judgment will then stand thus: — That so much of the

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interlocutor of the 19th November 1833, appealed against, as finds that the defender is not bound to grant to the pursuer, for behoof of the corporation, a personal obligation for payment of the yearly dues or ground rents specified in the libel, or for the performance of the clauses and conditions contained in the articles of roup, or in the burgage disposition granted by John Finlayson, boxmaster of the corporation, in favour of George Nicol; and so much as finds that the defender is not liable to pay to the pursuers or their successors in office the sum of 16*l.* 6*s.* 6¾*d.* with interest, as part of the expense of erecting the metal railing and dwarf wall round the centre of Bon Accord Square; and so much as finds that the defender is bound to lay the foot pavement opposite to and along the sides of the subjects disponed to George Nicol, and to erect an iron railing at the east end of the said subjects in conformity with the provisions in the burgage disposition, and within the time therein mentioned; and so much as finds that the defender is not bound to lay the pavement at the west end of the subjects fronting Bon Accord Terrace, there being no obligation to that effect in the disposition to Nicol; and so much as finds that the defender is liable to the pursuers in the sum of 27*l.* 14*s.* 2*d.*, being his proportion of erecting a common sewer, of which he has taken benefit since the purchase from Nicol; be and the same is hereby affirmed: And as to so much of the said interlocutor as assoilzies the defender from all the other conclusions of the libel, remit to the Court of Session, with the direction* that in respect of the decla-

* This reference to the first declaratory conclusion will be sufficient to affirm the finding below, that A. Coutts is not barred personali exceptione.

ratory conclusion of the summons against the defender as a singular successor, disponee of G. Nicol, the said Court do decern and declare in terms of the said interlocutor, that the obligation of the defender to lay the foot pavement opposite to and along the sides of the subjects disponed to Nicol, and to erect an iron railing at the east end of the said subjects in conformity with the burgage disposition and within the time therein mentioned *, is a real burden upon the property in question, and is binding on the defender; and that the said Court do of new assoilzie the defender from all the other conclusions of the libel, and that they do decern accordingly; and that they do further find the pursuers liable to the defender in all expenses of process in the Court below, down to the termination of the proceedings, except in so far as the discussion and proof regarding the common sewer is concerned, but the defender liable to the pursuers in the expenses of the said discussion and proof; and that they do remit the accounts of the said expenses, when given in, to the auditor to tax and report.

The alteration made in the interlocutor is far too slight to make any difference in the portion of that interlocutor ordering the pursuers to pay the defender's expenses below.

Considering the attacks made upon his character, and from which the pursuers were driven, he clearly must have his expenses throughout the whole proceeding there, notwithstanding the finding against him, now

* Namely, that it does not go all round. The finding excludes the west end; so that the clause in the disposition is to be read:—"Along the sides of the said piece of ground, "in front of the said square and street, eight feet broad."

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added to the former finding against him, but added, as has already been observed, in little more than form.

As to the costs here, those of the cross appeal must be paid by the respondent, but the clerk will take care to ascertain whether or not it was necessary for the appellants to present a separate case, which the respondent did not. It is extremely to be regretted that the costs of the principal appeal cannot be given against the appellants after the attacks made on the respondent in the Court below; but it has been a thing unavoidable to alter the interlocutor; and it was, even in the matters which stand against the appellants, a question involving much doubt; so that after the abandonment below of all attacks on the respondent's character, the appeal could not be considered so vexatious as to justify giving costs where, to a certain, though small extent, it has succeeded.

It remains to add, that although the litigation has unfortunately cost a great deal more than the value of the matter in dispute, the discussion which the question has undergone possibly will prevent,—most certainly it ought to prevent, any further dispute respecting the rights of the parties under the burgage disposition in question. It is true that the judgment now for the most part affirmed has not declared how far many of the obligations are real burdens on the property, as the obligation to build, and others mentioned in the opinions of the learned judges on the remit. But this was owing to a defect in the pleadings; and there can be no doubt whatever, that had the summons been properly framed the pursuers would have had declaratory findings on all those matters on which the opinions of the learned judges have been unanimously pronounced in their favour.

The House of Lords ordered and adjudged, That so much of the said interlocutor of the Lord Ordinary of the 19th of November 1833, appealed against in the said appeals, as finds that the defender is not bound to grant to the pursuer, for behoof of the corporation, a personal obligation for payment of the yearly dues or ground rents specified in the libel, or for the performance of the clauses and conditions contained in the articles of roup or the burgage disposition granted by John Finlason, boxmaster of the corporation, in favour of George Nicol; and so much as finds that the defender is not liable to pay to the pursuers or their successors in office the sum of 16*l.* 6*s.* 6½*d.*, with interest, as part of the expense of erecting the metal railing and dwarf wall round the centre of Bon Accord Square; and so much as finds that the defender is bound to lay the foot pavement opposite to and along the sides of the subjects disponed to George Nicol, and to erect an iron railing at the east end of the said subjects, in conformity with the provisions in the burgage disposition, and within the time therein mentioned; and so much as finds that the defender is not bound to lay the pavement at the west end of the subjects fronting Bon Accord terrace, there being no obligation to that effect in the disposition to George Nicol; and so much as finds that the defender is liable to the pursuer in the sum of 27*l.* 14*s.* 2*d.*, being his proportion of erecting a common sewer, of which he has taken benefit since his purchase from George Nicol, with interest, as libelled, — be and the same is hereby affirmed. And it is further ordered, That as to so much of the said interlocutor as assoilzies the defender from all the other conclusions of the libel, it be remitted to the Court of Session, with this direction, that in respect of the declaratory conclusion of the summons against the defender as a singular successor disponee of George Nicol, the said Court do decern and declare, in terms of the said interlocutor, that the obligation of the defender to lay the foot pavement opposite to and along the sides of the subjects disponed to George Nicol, and to erect an iron railing at the east end of the said subjects, in conformity with the burgage disposition, and within the time therein mentioned, is a real burden upon the property in question, and is binding on the

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defender; and that the said Court do of new assoilzie the defender from all the other conclusions of the libel, and that they do decern accordingly; and that they do further find the pursuers liable to the defender in all expenses of process in the Court below, down to the termination of the proceedings, except in so far as the discussion and proof regarding the common sewer is concerned, but find the said Adam Coutts the defender liable to the pursuers in the expense of the said discussion and proof; and that they do remit the accounts of the said expenses, when given in, to the auditor, to tax and to report: And it is further ordered, That the said Adam Coutts, the respondent in the said original appeal, do pay or cause to be paid to the said appellants the costs incurred by them in respect of the said cross appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

A. DOBIE — RICHARDSON and CONNELL, Solicitors.

[*6th August* 1840.]

WILLIAM CUNNINGHAM C. GRAHAM of Gartmore and Finlaystone, THE SCOTTISH UNION INSURANCE COMPANY, and ALEXANDER HAMILTON, W. S., Common Agent for the Creditors of the said W. C. C. GRAHAM, Appellants.[1] (No. 17.)

[*Pemberton — Sandford.*]

ROBERT CUNNINGHAM BONTINE of Ardoch, and his Son and Daughter, and their Administrator at Law, Respondents.

[*Attorney General* (*Campbell*)—*Tinney*—*Spiers.*]

Entail — Investiture — Irritancy.—Two separate deeds of entail executed as procuratories of resignation by the same party were inserted in one charter, the clauses verbatim the same in each entail not being repeated, the charter at the same time setting forth the fact that there were two separate entails: Held (affirming the judgment of the Court of Session) that although ex figurâ verborum the construction of the charter might raise the inference that a contravention of the one entail would induce a forfeiture of both estates, the charter must be construed applicando singula singulis, and that therefore an heir of entail possessing under the charter so framed and under a subsequent charter of resignation expede by him, and framed in similar terms, had not possessed adversely to the original entail, but was subject to the fetters thereof.

A. in 1767 executed an entail of his estates in the form of a procuratory of resignation comprehending, inter alia, the lands of C. & D. The lands of C. were held of a subject superior. The dominium directum of the lands of D. had been previously in the possession of A.'s family, the dominium utile was conveyed to A.'s father in 1708 by dis-

[1] Fac. Coll., 12th June 1835, 2d March 1837; and 15 D., B., & M.

position from the then owner; no infeftment was taken thereon till 1757, when A., as heir of his father, executed the precept, and was infeft, and in 1765 A. granted a charter of confirmation to himself. The other lands comprehended in the entail were held of the Crown. A. died without having executed the procuratory, and was succeeded by his son, who, after executing the procuratory, obtained a Crown charter in 1779, comprehending inter alia the lands of D., but died without being infeft. On his death B., the grandson of A., took infeftment on the Crown charter so obtained. In 1814 B. obtained a precept of clare constat from the superior of C., was infeft, and disponed the lands of C. In 1815 B. obtained a decree reducing A.'s infeftment on the disposition of 1708, and disponed the lands of D. In an action against B., by the next substitute, to have it found that in consequence of the fee-simple titles made up to the lands of C. and D., and of his having alienated them, the whole remaining entailed estate devolved to him from the date of citation: Held (affirming the judgment of the Court of Session), 1st., that B. was subject to the entail in regard to the lands of C.; 2d., that the dominium utile of D. had been consolidated with the superiority, and that, with regard to the lands of D. also, B. was subject to the entail; and therefore that the pursuer of the action was entitled to decree in terms of the libel.

BOTH DIVISIONS.

Lord Ordinary Corehouse.

NICOL GRAHAM held the estate of Gartmore and others of the Crown; he also held the lands of Gartinstarry in virtue of an infeftment on a charter of resignation and confirmation in favour of himself and his heirs, from the superior, the Duke of Montrose. He likewise was proprietor of the lands of Garchell. The dominium directum of these lands had been long in the Gartmore family, and in 1708 the dominium utile was conveyed by Mary Hodge to Robert Graham, then of Gartmore, by a disposition containing procuratory of resignation, and precept of sasine. Robert Graham

entered into and continued in possession till his death, without executing either procuratory or precept.

In 1756 Nicol Graham was served heir male of line and provision in general to Robert Graham his father; in 1757 he was infeft on the above-mentioned precept, and in 1765 he executed a charter of confirmation of the disposition by Mary Hodge, and his infeftment thereon, in favour of himself.

In 1767 Nicol Graham executed a strict entail of his estates, in the form of a procuratory of resignation, in favour of himself in liferent, and William Graham his eldest lawful son, and the heirs male of his body in fee, which failing, Robert Graham (father of the appellant), his second son, and the heirs male of his body, which failing, certain other substitutes. The deed was recorded in the register of tailzies the following year. In this deed were included the lands of Garchell, as well as the lands of Gartinstarry.

This entail, besides the usual irritant clauses against alienation, &c., contained likewise the following clause: "Providing also, that the said William Graham, and "the haill other heirs of tailzie above mentioned, shall "bruick, enjoy, and possess the said tailzied lands and "estate by virtue of this present right and tailzie, "and infeftments to follow hereon, or any other "right that I have in my person to the foresaid lands "and others above written, and by no other right "and title whatsoever; and the said William Graham, "and the haill other heirs of tailzie above specified, "shall be obliged timeously to obtain themselves "entered, infeft, and seized in the said lands and "estate, and not to suffer the same to lie in non-"entry; and also to cause insert in the instruments of "resignation, charters, and infeftments to follow hereon,

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" and in the haill procuratories and instruments of " resignation, charters, services, retours, precepts of " sasine, and instrument of sasine, and haill other con- " veyances of the said lands and estates, all the pro- " visions, declarations, and irritancies of the present " tailzie."

The resolutive clause declares, that "the person or " persons so contravening or failing to fulfil the above- " written conditions and provisions, or any one of them, " shall, for themselves, ipso facto, amit, lose, and for- " fault their rights and interest in the said lands and " estate, and the same shall become void and extinct; " and it shall be lawful to the next heir of tailzie, who " should succeed if the contravener was naturally dead, " albeit descended of the contravener's own body, to " purge, and obtain declarators upon the contravention " or failing to fulfil any of the provisions or conditions, " or to obtain adjudications of the foresaid lands and " estate."

In 1774 Nicol Graham executed another deed of entail of the lands of Wester Culbowie and others, in favour of himself in liferent, and of his wife, Lady Margaret Graham in liferent, and the said William Graham, his eldest son, and the heirs male of his body, whom failing, the said Robert Graham, his second son, and the same series of heirs as in the other entail. This latter deed was not recorded.

William Graham, the entailer's eldest son, having predeceased him without issue, the succession opened, on the death of Nicol Graham, to the said Robert Graham, his second son, who in 1775 expede a general service as heir male of tailzie and provision to his brother the said William Graham under the entail 1767, and in 1776 he also expede a general service under

the entail 1774, as heir male of tailzie and provision to his father Nicol Graham. This difference in the services was accounted for by the respondent, by alleging that William Graham predeceased the execution of the entail 1774. A charter was then obtained from the Crown, comprehending the lands contained in both entails, with certain immaterial omissions, and omitting the heirs who had predeceased, and their descendants, and containing all the clauses in each deed, with this exception, that in so far as they were indentically the same in each they were not repeated. The charter disponed first the lands in the entail 1767, and then those in the entail 1774, and distinctly explained that these lands were contained in two separate deeds of entail, and correctly mentioned the different warrants of resignation. In 1778 Robert Graham was duly infeft on this charter. In 1779 Robert Graham executed a procuratory of resignation of the lands in the charter 1776 in terms thereof, on which he obtained a new Crown charter, but died without being infeft upon it. On Robert's death the appellant, W. C. C. Graham, served heir male of tailzie and provision, and took infeftment on the precept in the charter 1779, in 1799.

With regard to the lands of Gartinstarry, which do not appear to have been included in the charter 1779 and infeftment thereon, the appellant W. C. C. Graham, in 1814, obtained from the then superior of these lands a precept of clare constat, as heir of provision of Nicol Graham, his grandfather, in virtue of which he was infeft the same year. He then granted a heritable bond over these lands, and afterwards sold them.

The lands of Garchell, &c. were in 1815 conveyed to a trustee, who brought a reduction of Nicol Graham's infeftment in 1757, above mentioned, against the appel-

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lant, W. C. C. Graham, on the ground that the retour of his service was not exhibited to the baillie, and not noticed in the infeft, and decree of reduction was pronounced the same year. The appellant W. C. C. Graham then expede a general service as nearest and lawful heir male of provision to Nicol Graham, and took infeftment in 1816 on the disposition by Mary Hodge in 1708, and at the same period the trustee was infeft on W. C. C. Graham's disposition to him. These lands were then sold to different parties, and for the greater part of them parts of the lands which were feudalized under the entail (the lands of Mendowie, Coalrigrean, Drum of Armanual, and others) were excambed in terms of 10 G. 3. c. 51. The superiority of these lands were alleged to have been disentailed under the authority of the act of 20 G. 2. c. 50.

In these circumstances the respondent, who is the eldest son of the defender, brought the present reduction, for himself and as administrator for his minor children.

The summons, after stating that the defender had made up titles in fee simple to the lands of Garchell and Gartinstarry, in contravention to the entail of 1767, in which they were included, and after narrating the sales of these lands, concludes, that it should be found and declared, that the defender did, in contravention of the said tailzie, make up titles in his person to these lands of Gartinstarry and Garchell, without inserting the provisions, &c. of the entail in the rights and conveyances expeded in his person; and that the defender did sell the above lands, or contract debts, or grant dispositions in security of the said debts, contrary to and in direct contravention of the said tailzie.

The summons then proceeds:—"And the several acts "of contravention therein specified, or any one of them,

" being established to the satisfaction of the said Lords, " it ought and should be found and declared by decree " foresaid, that the said W. C. C. Graham, defender, " has thereby incurred an irritancy of, and amitted, " lost, and forfeited all right, title, and interest in the " said whole entailed lands and estates above described, " contained in the said deed of tailzie, and every part " thereof, and that his right, title, and interest in and " to the said whole lands and estates and every part " thereof are now and shall in all time coming be void " and extinct; and it ought and should be found and " declared by decree foresaid, that the said whole lands, " teinds, and others above described, with the rents, " maills, and duties of the same falling due from and " after the date of citation to follow hereon, have fallen, " devolved, and accresced and do now belong to the " said R. C. Bontine, pursuer, as the next heir ap- " pointed to succeed by the said deed of entail, and " that free and disburdened of the foresaid dispositions " and infeftments thereon, and of all and every other " act done and deed granted by the said defender in " relation to the said several lands and others in con- " travention of the said tailzie, in the same manner and " as fully and freely in all respects as if the said defen- " der had never been in the possession of the said lands " and estates; reserving entire to the pursuers all right " of action competent to them and the other heirs of " entail against the defender, for the loss and damage " which they have sustained or may sustain by and " through the foresaid sales, and other acts done and " deeds granted by the defender in contravention of the " foresaid tailzie; as also reserving all right of chal- " lenge competent to the pursuers and other heirs of " entail, for reducing and setting aside the conveyances

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"and other rights to the said lands and others granted "by the defender to the purchasers or disponees, and "all heritable securities granted over the said lands or "any part thereof by the defender to creditors or "others."

In this action Mr. Graham alone was called, but the trustees for his creditors, who are appellants, also sisted themselves.

In defence the following plea, inter alia, was raised out of the construction of the charter as above stated, viz. that the two entails of separate and distinct estates being amalgamated in the charter 1776, the charter in truth conveys the estates of Gartmore and Culbowie as one single estate, to which the irritant and resolutive clauses are made to apply indiscriminately, and a contravention upon any part of either estate operates a forfeiture of the whole of both. The investiture under the charter 1776 is, therefore, not an investiture under both or either of the procuratories, but forms a totally different entail from both or either, varying from them essentially in the provisions of entail and in their application. The estates have thus been possessed upon a title adverse to both entails since the date of the said investiture.

The Lord Ordinary (24th January 1833), after closing the record, reported cases, with which he made avizandum to the Court, adding the subjoined note[1], explanatory of this and the other pleas.

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[1] "*Note.*—Some of the points raised in this case do not seem to be at- "tended with difficulty. The entail 1767 being an irrevocable deed, in "so far as the interest of William Graham was concerned, the granter "having reserved his own life rent, and the deed itself having been re- "corded by him in the register of tailzies, it must be held as having "been delivered, and therefore the service of Robert Graham to his brother "William was an effectual and proper mode of completing his title; and

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The Lords of the First Division, after considering the cases, appointed the same (2d July 1833) to be laid before the other judges for their opinions upon the following questions, as settled by the counsel for the parties:—

Whether the titles completed by Robert Graham, the father of the defender, W. C. C. Graham, by the Crown charter in 1776, and the sasine following thereon, were framed in conformity to the deeds of entail executed by Nicol Graham in 1767 and 1774? Or, whether the

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" the defender, having connected himself with this entail by service to his " father, is bound by its conditions.

" With regard to prescription; as the pursuer was the next substitute " to the defender, and entitled by his contravention to take the estate, it " is thought that, agreeably to the principle adopted by the House of " Lords in the Bargany case, the minority of the pursuer must be deducted " in counting the years of prescription.

" There were two entails,—one of Gartmore and the other of Culbowie, " &c., which, mutatis mutandis, were identical in every important clause, " and they were both duly recorded.[1] Robert Graham, in expeding a " charter upon these entails, did not keep the conditions of the one sepa- " rate from those of the other, but combined them, as if there had been " but one estate and one entail; and this charter was not recorded in the " register of tailzies. Hence, ex figurâ verborum, a contravention of " the entail of Gartmore would, under the charter, forfeit not only that " estate, but the estate of Culbowie also; and, in like manner, a contra- " vention of the entail of Culbowie would forfeit the estate of Gartmore. " In an ordinary deed these conditions would be construed applicando " singula singulis, agreeably to the obvious meaning of the granter; a " rule arising out of the usual forms of expression, and generally adopted " with regard to every species of writing. But whether this rule obtains " in the case of an entail is more doubtful, as that instrument is construed " with a strictness and rigour unknown in every other case. If the ordi- " nary licence is not to be allowed, the entail in the charter of 1776 is " different from those executed in 1767 and 1774; and as the entail in " the charter enters the register of sasines only, while the two entails " are recorded in the register of tailzies only, the estates are not pro- " tected against the diligence of the defender's creditors, some of whom " are parties to this action. As the point is new, and the interest at " stake considerable, the Lord Ordinary has thought it right to report " the cause."

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[1] The entail of Culbowie was not recorded in the register of tailzies at the time the action was brought.

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entail contained in the said charter and sasine is the same with or different from both or either of the entails contained in both or either of the said deeds of entail of 1767 and 1774; and if different, what is the legal effect and consequence of such difference? And whether by the titles so completed by the said Robert Graham, and by those completed by his son, W. C. C. Graham, the lands contained in the entail 1767, (which entail had been previously recorded in the register of tailzies,) are effectually secured against the debts and deeds of the said W. C. C. Graham; and whether the said entail is binding and effectual against him in questions with the substitute heirs of tailzie.

The consulted judges having expressed a wish that the case should be argued vivâ voce before the whole Court, a very full argument accordingly took place in the course of the summer session 1834; and the following opinions were then returned by the consulted judges:—

Opinions of Consulted Judges.

Opinions of Lord Justice Clerk, Glenlee, Meadowbank, Medwyn, and Corehouse.

The first question on which the opinions of the consulted judges are required is, whether the titles completed by Robert Graham by the Crown charter 1776 and the sasine following thereon were framed in conformity with the deeds of entail 1767 and 1774; or whether the entail contained in the charter and sasine is the same with or different from both or either of the entails contained in both or either of those deeds?

The defenders have specified various particulars, in which they say that the entail in the charter and sasine is different from the entails in the deeds. In our opinion, the pursuers have, with one exception, satis-

factorily accounted for all those differences, and have shown that either necessarily, or in strict conformity with the correct principles and usual practice of conveyancing, they took place in the preparation of the investiture. Thus, although there are lands contained in the deeds of entail which do not appear in the investiture, the lands so omitted were held of a subject superior, and were, therefore, necessarily excluded from a charter granted by the Crown. Thus, also, certain substitutions in the entails do not occur in the charter; but as those substitutions were extinct or inoperative before the charter was expeded, they were omitted with perfect propriety, and agreeably to ordinary practice.

But the exception to which we allude, and upon which the defenders seem now exclusively to rely, relates to the structure of the irritant and resolutive clauses in the investiture. In framing the charter 1776, the entails 1767 and 1774, instead of being kept separate, as they ought to have been, were combined, so that, if the charter with the sasine upon it is alone considered, a contravention of the provisions in the entail of Gartmore would apparently infer a forfeiture, not only of that estate, but of the estate of Culbowie also; and, vice versâ, a contravention of the entail of Culbowie would apparently infer a forfeiture of the estate of Gartmore. To that extent it is clear that the entail, as it stands in the investiture, is not in form absolutely identical with the entails in the deeds 1767 and 1774; and this the pursuers do not dispute.

We come, therefore, to the second point to which our attention is directed, namely, what is the legal effect and consequence of this difference? Which, reversing the order suggested, we think may best be considered, 1st, as in a question between the pursuers

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and W. C. C. Graham, that is, between the substitute heirs and the heir in possession; and 2dly, between the pursuers and the other defenders, who appear in the character of third parties or creditors.

In a question between the substitute heirs and the heir in possession, it will be observed, that the estates contained in the two deeds of entail are conveyed separately in the charter, and it is declared that they are conveyed under the conditions and provisions and under the irritant and resolutive clauses in two deeds of tailzie; that Robert Graham and the other heirs of tailzie shall enjoy and possess the estates by virtue of the said two deeds of tailzie; that he shall insert the conditions of the said tailzies in the charters and infeftments which are to follow on these tailzies; that no acts of contravention shall prejudice the heirs destined to succeed by the deeds of tailzie, and so forth, keeping both deeds constantly in view; and in the clause of quæquidem the progress of the separate estates contained in each tailzie is set forth, and both tailzies are specially described by the respective dates of their execution and of their registration in the books of session. In answering this first question, which arises between the substitutes and the heir in possession alone, and in which, therefore, the provisions of the act 1685 do not enter into the case, it is necessary to consider upon what principle the charter 1776 is to be construed. We conceive that the special references in that charter to the two entails, under which it is declared that the two estates shall be held and enjoyed, are sufficient authority for taking into view both those entails, for the purpose of ascertaining its import. If that be granted, it makes way for the rule quod singula singulis sunt applicanda, for materials are given

upon which that rule can operate. We do not mean to say, that in every case an investiture may be construed by reference either to prior investitures or to the warrants on which it proceeds; but when in the investiture to be construed express reference is made to those warrants, as explaining or authorizing the rights which it confers, we think that this is a legitimate mode of construction. Nor is this opinion at variance with the recent decisions in Hope Vere's case [1], because there the destination in the old entail 1708 could not possibly be reconciled with the destination in the new entail 1733, and it was manifest that those who framed the latter laboured under the mistake that the two destinations were the same. If they had been informed of their mistake, there was no reason to conclude that they would have been induced to depart from the new destination. That destination, therefore, which neither required nor admitted of construction was necessarily adopted, though its author, the Countess of Hopetoun, was in error either as to its effect, or as to the effect of the preceding entail to which she referred; but whether as to the one or the other did not appear. Here the case is reversed: whenever the rule singula singulis is admitted, the charter 1776 is not only not irreconcileable with the entails upon which it proceeds, but is in exact conformity with them.

If, instead of the present action, a declarator of irritancy had been brought against the defender W. C. C. Graham to forfeit Culbowie, on the ground that he had contravened the entail of Gartmore, we do not think that he could have been precluded by the form of his investiture from showing that he had violated no con-

[1] 2 Sh. & M'L. 817.

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dition of the entail, under which that very investiture provided that he should exclusively possess and enjoy that estate: and so, vice versâ, if a contravention as to Culbowie were pleaded as a forfeiture of Gartmore. But if a plea, which necessarily infers that the entails are still in force, would have been available in his favour in that action, it must be so against him in this action, in which he maintains that the same entails are extinguished.

The question assumes a different shape when it occurs with third parties, and when the provisions of the act 1685 come into operation. A purchaser or creditor is entitled to look for the conditions and fetters of an entail, either in the register of tailzies, or in the record of sasines exclusively. He is not bound to compare the one with the other, nor can he be referred to any deed not part of the registered entail or recorded sasine to explain either of them. In his case, therefore, it may be plausibly argued that there is no place for the rule singula singulis, because the recorded investiture contains nothing to show that the conditions and fetters of each of the deeds of entail are not identical with the conditions and fetters of the entail set forth in that investiture, and if they are not the same, that he is entitled to hold that the entails are not duly recorded in the register of sasines.

We are of opinion that this argument is not conclusive. The object of the act 1685 plainly is that all the conditions and fetters of entails, by which purchasers or creditors can be endangered, should be disclosed by means of two records, on either of which they may rely for information. But while they are secured that no restriction can exist unless it be so recorded, they are not secured, nor are they entitled to infer, that every

restriction which is recorded must therefore be operative. On consulting the register of tailzies, the irritant and resolutive clauses in a deed may appear impregnable, while a defect in the record of sasines may render them utterly ineffectual; and so, on the contrary, a defect in the register of tailzies may defeat the most accurately recorded investiture. And as all the restrictions in a tailzie may thus become inoperative, so may any one restriction in whole or in part. This can be of no prejudice to third parties; they are certiorated fully of all dangers to which they can be exposed, but they are not informed whether or to what extent those dangers may be avoided. Thus, if part of an estate, which is placed under an entail, be sold by the entailer, or evicted from him before the entail is recorded, the register will show all the prohibitions and irritancies as if they affected that subject, although it has been withdrawn from their operation. On that principle in one case the Court refused to allow a tenement to be omitted in recording an entail, which the entailer had disposed of before his death. In similar circumstances the heir, in making up his titles, may safely omit that tenement withdrawn from the entail, and that omission will not affect the validity of the entail as to the remainder of the estate. Thus also, if an entailer, under a reserved power to alter, were, by a subsequent deed, to relax the fetters, by granting permission to feu, or lease, or burden, or the like, an omission to insert that subsequent deed in the register of tailzies or in the investiture would not render the entail, in so far as it was unaltered, ineffectual against purchasers or creditors, on the ground that the provisions of the act 1685 had not been complied with; or, suppose a permission to the same effect were inserted in the entail itself, as

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an exception to the prohibitory clause, and that exception was omitted in the record by the negligence of the transcriber, it clearly could not be maintained that the record was inoperative quoad ultra, and the whole estate laid open to the diligence of creditors. It follows, therefore, that if all existing conditions and fetters appear in both records, the appearance in either record of others which do not exist is immaterial. We think that this is not only the sound construction of the statute, but that it admits of no other construction; for while it is indispensable that each record shall show how far the fetters it exhibits may bind, it is impossible that either of them can show how far those fetters may not bind. To ascertain this, other sources of information must be resorted to.

Let the statute, so construed, be applied to the present case. On the one hand, it is admitted that the entail 1767 is recorded in the register of tailzies with perfect accuracy; and, on the other hand, it is incontestible that the record of sasines exhibits every prohibition and fetter in that entail, by which the estate can be affected to the prejudice of purchasers or creditors. The only objection to the record of sasines is that the forfeitures under both entails inserted in a combined form are more extensive in appearance than they are in reality; an objection which, on the grounds now stated, we consider of no validity. Thus it appears that when the heir in possession pleads prescription on the entail 1776 against the entails 1767 and 1774, the pursuers can show that, by a rule of construction legitimate in that question, the import of the former is identical with that of the latter; and when the creditors plead that the fetters of the entail 1767 do not enter the investiture in terms of the statute 1685, it is a good

answer that the provisions of that statute are fully complied with.

The entail 1774 was not recorded, and in consequence of that neglect the estate was sold. But this circumstance does not in any respect affect the argument in so far as the entail 1767 is concerned.

We are of opinion, therefore, that by the titles completed by Robert Graham and his son W. C. C. Graham, the lands contained in the entail 1767 are effectually secured against the debts and deeds of the said W. C. C. Graham, and that the said entail is binding and effectual against him in questions with the subsequent heirs of entail.

Addition by Lord Moncreiff.

This case has appeared to me to be attended with very considerable difficulty. But after giving all the attention in my power to the argument in the papers and from the bar, and considering deliberately the views taken in the above opinion, I am inclined to concur in it, being on the whole satisfied that the investitures completed under the charter 1776 are consistent with the strictest application of the rule of the statute 1685. I only think it necessary to add, that I could not have come to this result on some of the grounds of law maintained by the pursuers, and that it is only on the principle of giving the strictest construction to the deeds framed in execution of the statute that I now do so.

Addition by Lords Fullerton and Jeffrey.

We concur in the conclusion arrived at in the preceding opinion, viz. that under the titles completed by Robert Graham and his son William Cunninghame Cunninghame Graham, the lands contained in the entail 1767 did and still do remain subject to the fetters of

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that entail; and we also concur in the greater part of the reasoning by which that conclusion is supported. The entail 1767 contains all the prohibitions and restrictions necessary for the protection of the estate against the acts and deeds of the heirs in possession. To render such conditions effectual against third parties, it is necessary that they should appear in the titles by which the heirs possess; it being provided by the act 1685, "that such tailzies shall only be allowed in which the "foresaid irritant and resolutive clauses are insert in "the procuratories of resignation, charters, precepts, "and instruments of seasine." In regard to creditors, then, the only question here is, whether the irritant and resolutive clauses of the entail 1767 can be held to be "insert" in the charter and infeftment of 1776?

For the reasons assigned in the preceding opinion, and even upon the view there taken, viz. that the resolutive clause, as expressed in the charter, embraces certain other lands in addition to those contained in the entail 1767, and may therefore have a more extensive operation, we think that the question ought to be answered in the affirmative.

But, further, we must be permitted to question whether that view be correct, and whether there is any necessity for resorting in the present case to those grounds of decision. It rather appears to us that the resolutive clause in the charter, the only clause which raises any difficulty, has not, according to the legitimate construction of the charter itself, any more extensive meaning in regard to the lands of Gartmore than the original entail 1767.

The entailer, Nicol Graham, executed two procuratories of resignation, each forming a deed of entail. The first, that of 1767, included various lands which shall be

termed the lands of Gartmore; and the other, that of 1774, contained the lands which may be designed the lands of Wester Culbowie. Robert Graham, the entailer's second son, executed both procuratories, and expede the Crown charter 1776, obviously for the purpose of making up titles under those entails to both sets of lands in so far as they held of the Crown. Accordingly, the charter distinguishes the two estates and the two entails with the greatest precision. There is a separate dispositive clause, first of the lands of Gartmore, &c., and, secondly, of the lands of Wester Culbowie, Broich, Broichmiln, &c.; and these dispositive clauses bear to be granted "cum et sub particu- "laribus reservationibus, provisionibus, declarationibus, "exceptionibus, et clausulis irritantibus et resolutivis "postea express., et non aliter, in duabus syngraphis "talliæ postea mentionat. content." &c.

By the expression "postea mentionat" reference is clearly made to the quæquidem clause, which is also a double clause, distinguishing the entail of 1767:— "Quæquidem integræ terræ, baroniæ, molendina, "terræ molendinariæ, decimæ, aliaq. predict. (ante- "dict. terris de Wester Culbowie, Broich, et molendino "de Broich, decimisq. ejusd. exceptis) contentæ fuere "in syngrapha talliæ per dict. Nicolaum Graham "execut., de data secundo die Martii, anno millesimo "septingentesimo sexagesimo septimo." Here the first entail 1767 is described as containing all the lands in the charter, with the exception of Wester Culbowie; and then follows the other part of the quæquidem:— "Et quæquidem prædict. terræ de Wester Culbowie, "Broich, et Broichmiln, cum decimis, partibus, privi- "legiis, et pertinen. perprius hæreditarie pertinuerunt," &c.; "et (inter alia) in alia syngrapha talliæ contentæ

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" fuere per dict. Nicolaum Graham execut. duodecimo " die Decembris anno millesimo septingentesimo sep- " tuagesimo quarto." And the clause concludes with a statement of the resignation of both sets of lands, but still accurately distinguishing between the two different entails, as the sources from which the fetters in regard to each estate are respectively derived:—" Quæ integræ " terræ, baroniæ, molendina, decimæ, aliaq. prædict. " per virtutem dict. duarum procuratoriarum resigna- " tionis in duabus respectivis syngraphis talliæ supra- " mentionat. content. et duorum generalium servitiorum " dict. Roberti Graham," &c. " legitime resignatæ et " redditæ fuerunt in manibus dict. Jacobi Montgo- " mery," &c. " cum et sub conditionibus, provisionibus, " reservationibus, potestatibus, declarationibus, clausulis " irritantibus et resolutivis supra expressis in duabus " talliæ syngraphis supra recitatis contentis," &c.

Combining, then, the descriptions of the entails in the quæquidem with the close of the dispositive clause expressly referring to those descriptions, the two sets of lands bear, ex facie of the dispositive clause, to be disponed under the provisions and restrictions and clauses irritant and resolutive after expressed, contained in two deeds of entail, the one, dated 1767, of the lands of Gartmore, and the other, dated in 1774, of the lands of Wester Culbowie. The charter then enumerates in detail the prohibitions and restrictions; and it is of some importance to observe, that in the clause immediately preceding that which raises the present question there is a clear reference to both entails. It is there provided that Robert Graham and the other heirs shall possess the entailed estate " virtute dict. duarum syngrapharum " talliæ et infeofamentorum desuper consecutorum," &c., and shall be bound to insert in the instruments of resig-

nation and infeftments, &c. "totas provisiones, decla- "rationes, et irritantias dict. talliarum." Then follows the combined irritant and resolutive clause, which declares that if the said Robert Graham and the other heirs shall fail to assume the name and arms prescribed, or shall fail to perform the other provisions and conditions, then and in any of those cases not only shall all the acts and deeds of omission, commission, &c. be void and of no effect against the said lands, and no part of the same shall be affected or burdened by those acts, &c. "in prejudicio hæredum talliæ et provisionis supra "specificat. destinat. succedere virtute dict. talliæ syn- "grapharum, cum et sub provisionibus supra specificat., "sed etiam persona vel personæ ita contravenien. vel "deficien. implere conditiones et provisiones supra- "script. vel quamlibet earundem pro seipsis ipso facto "amittent, perdent, et forisfacient eorum jura et inter- "esse in dict. terrar. et statum," &c.

Considering the form and general tenor of this charter, it appears to us, that in reading this clause, as well as the other clauses in the deed, the construction applicando singula singulis is not only legitimate, but is the only construction which can be reasonably admitted. When, as in the present case, a charter conveys two separate parcels of lands, each described as contained in a separate entail and under the clauses irritant and resolutive in those two entails, and proceeds to enumerate the special clauses irritant and resolutive, it seems to follow that each provision and restriction in regard to each parcel of lands respectively is referable to the entail in which each parcel is contained. Thus, although the prohibitory clause against selling or contracting debt is in this charter generally expressed, and without distinguishing in terms the lands of Gartmore from the

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lands of Culbowie, for the obvious reason that the clause is the same in both entails, the meaning of the clause is as unambiguous as if it had been expressly declared that the prohibition in regard to the lands of Gartmore is referable to the entail of Gartmore, and the prohibition in regard to Culbowie to that of Culbowie. There is still less doubt as to the construction of the clause binding the heirs to hold the entailed lands and estate in virtue of the two deeds of entail; as it can hardly be contended that it imports a provision, not that each estate is to be held by each entail respectively, but that each estate is to be held by both entails. Such being clearly, then, the true reading of the preceding clauses, we humbly conceive that we are offering no violence to the terms of the deed, when, in the immediately succeeding passage, being the combined irritant and resolutive clause, we follow the same course, and hold, applicando singula singulis, that the clause does not import more than that contained in the original entails, viz. a forfeiture of Gartmore in the event of a contravention of the entail of that estate, and a forfeiture of Culbowie in the event of the contravention of the entail of Culbowie. Neither are we aware of countenancing, by the adoption of this construction, any relaxation of those rules by which the rights of third parties are understood to be protected; for although the law unquestionably is, that fetters or restrictions shall not be raised by implications unwarranted by the express terms of the deed, it never has been held, that in construing a clause admitting by bare possibility of two meanings that which is favourable to the heir and the creditors must necessarily be adopted, although in itself the most inconsistent with the context and general structure of the deed. But the case is attended with still less diffi-

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culty when the true nature of the point in dispute is kept distinctly in view. The whole question arises on the resolutive clause in the charter,—a clause which, though of great importance in relation to the rights of third parties, operates only through the medium of its effect against the heir in possession who contravenes. But again, the only question of construction on this clause is, whether it imposes the penalty of a limited forfeiture on a limited contravention, agreeably to each entail respectively, or declares a forfeiture of the whole lands contained in both entails in the event of a contravention of only one? The former is truly the lenient construction, operating against the extension of fetters; and the question is not that which has usually occurred, whether a strict construction shall be enforced in favour of freedom from fetters, but whether a strict, or rather, as it appears to us, a strained, interpretation shall be adopted, in order to extend the fetters beyond what the natural reading of the deed would authorize?

Upon these grounds, and in addition to the opinion already expressed on the subsistence of the entail 1767, we are of opinion that the titles made up by Robert Graham, by the Crown charter 1776, involve no disconformity to the deeds of entail executed by Nicol Graham in 1767 and 1774.

Interlocutor of Court, 12th June 1835.

The First Division (12th June 1835) pronounced the following interlocutor:—"The Lords, on the report "of Lord Corehouse, and having advised the cases for "the parties and whole process, and heard counsel, "find, in terms of the opinions of the consulted judges, "that the titles completed by Robert Graham, the "father of the defender, by the Crown charter in 1776, "and the sasine following thereon, were framed in con-

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" formity to the deeds of entail executed by Nicol Gra-
" ham in 1767 and 1774; and that the entail contained
" in the said charter and sasine is the same with each
" of these entails, and that by the titles completed by
" the said Robert Graham and those completed by the
" defender the lands contained in the entail 1767 are
" effectually secured against the debts and deeds of the
" said defender; and that the said entail is binding and
" effectual against him in questions with the substitute
" heirs of tailzie; and decern. Quoad ultra, remit to
" the Lord Ordinary to hear parties on the remaining
" points of the cause."

The cause was remitted to the Lord Ordinary. Appearance was then made for the first time by the Scottish Union Insurance Company, who lodged a minute, stating that the defender, on 9th August 1819, had infeft the Hope Insurance Company in part of the entailed estate of Gartmore in security of an annuity during his life of 1,311*l.* 10*s.* 10*d.* by a bond of annuity, which declared " that these presents, and infeftments to
" follow thereon, are meant and warranted to have effect
" no further than is compatible with the said deed of
" entail;" that the Hope Insurance Company had sold this annuity to the Scottish Union Company, who had been since infeft; that they had obtained, on 10th July 1828, decree of adjudication against the defender (appellant) Graham and the lands of Gartmore and others, and therefore craving to be sisted as heritable creditors in these lands.

The Scottish Union Company were accordingly sisted as defenders, and adopted the record already closed.

Lord Ordinary's Interlocutor, 3d Feb. 1836.

The Lord Ordinary thereafter (3d February 1836) pronounced the following interlocutor, adding a note thereto as subjoined:—" The Lord Ordinary, having

" heard counsel for the parties, and having afterwards " resumed consideration of the record, productions, and " whole process, repels the objection to the title of the " pursuers to insist in the present action: finds that the " defender, William Cunningham Cunningham Gra- " ham, has incurred the irritancies set forth in the " summons, by alienating or putting away the lands of " Gartinstarry, with the pertinents thereof, the lands " of Garchell, comprehending the Offerance of Cashley " and others, or a part of the said lands, and also the " lands of Mendowie, Coalrigrean, Drum of Armanual, " and others, all portions of the estate contained in the " entail executed by Nicol Graham, Esq., of Gartmore, " mentioned in the record; and therefore declares and " decerns in terms of the libel: finds the pursuers en- " titled to expenses of process, and remits to the auditor " to tax the account thereof and to report." [1]

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[1] " *Note.*—The interlocutor of the Court, dated 12th June 1835, hav- " ing finally disposed of various points of the cause, the defenders now " plead,

" 1. That the pursuers have no title to insist, because the provisions of " the tailzie not being inserted in the rights and conveyances under which " Mr. W. C. C. Graham enjoys the estate, the irritancy incurred by this " omission extends vi statuti to the pursuers, his descendants.

" 2. That the defender, Mr. C. Graham, did not commit an act of " irritancy by disposing of the lands of Gartinstarry, and the dominium " utile of the lands of Garchell, and the Offerance of Cashley, because " they did not fall under the entail; and if the lands of Garchell had " fallen under the entail, that the irritancy has been purged.

" 3. That the conclusions of the action cannot affect the creditors of " Mr. C. Graham who have sisted themselves in the action as defenders, " their debts being made real incumbrances on the estate before his con- " travention has been declared, and these incumbrances being restricted to " his life interest in the estate.

" With regard to the first defence, when an entail declares that the " contravener shall forfeit for himself only, and not for the heirs of his " body, the Lord Ordinary considers it to be perfectly clear that neither " a contravention of the prohibitions of the entail, nor of the injunction " in the statute to insert all its provisions in the subsequent rights and " conveyances of the estate, can operate further than against the contra- " vener himself. The statute 1685 is inaccurately expressed, and it has

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" always been strictly construed against the fetters of entails. Thus it " enacts, that all the conditions of an entail duly recorded shall be effec- " tual, not only against the contravener and his heirs, but against his " creditors; and on that ground Mackenzie and other writers have held " that unless heirs are expressly exempted, irritancies apply to them. But " the reverse was decided in the case of Simpson, and the law has been " so settled ever since. On the same principle, although the statute " declares that the omission to insert the provisions in subsequent rights " and conveyances shall import a contravention by the person who omits, " and his heirs, this obviously signifies a contravention of the same extent " and effect with any other contravention of that entail, operating against " heirs, if the entail expressly forfeits heirs, but not otherwise; and this " is plainly the opinion of Mr. Erskine, as he places the one species of " contravention and the other on exactly the same footing. The legis- " lature could have had no object in inflicting a penalty in either case " severer than the entailer himself had thought proper to do.

" It seems equally clear that the lands of Garchell and those of Gar- " tinstarry were both effectually entailed. With regard to Garchell, the " dominium directum of these lands had been in the family of Gartmore " for a long period. In the year 1708 Robert Graham of Gartmore " acquired the dominium utile, and both it and the dominium directum " were possessed by him and his successors for a period of more than " forty years before the entail was executed by his descendant Nicol " Graham. According to a fundamental and most expedient principle " in our law of conveyancing, a consolidation of the superiority and pro- " perty was thus effected, and it is thought that they were not afterwards " separated by an unmeaning act of the entailer, who, long after prescrip- " tion had run, took infeftment on the precept in the disposition by which " the property had been conveyed to him. But whether they were again " separated or not, it was manifestly the intention of the entailer to " include them both in his entail. Indeed, the precept seems to have " been executed in majorem cautelam for that very purpose; and accord- " ingly the dispositive words in the bond of tailzie apply equally to both. " With regard to the lands of Gartinstarry, which hold of a subject " superior, it is admitted that they are expressly entailed; but as there is " a clause providing that the heir shall possess by virtue of the entail, or " by any other right in the entailer's person, it is argued that the defen- " der having completed his titles, not by executing the procuratory in the " entail, but on a precept of clare constat from the superior under the " previous fee-simple investiture, he was at liberty to possess on that right " independently of the entail. It is thought that the clause founded on " imports only, that no heir should pass by the entailer and make up a " title to the exclusion of the entail, but by possessing on rights which " were in the entailer's person, that he should subject himself to the obli- " gations in the bond.

" The defenders plead that the irritancy as to the lands of Garchell, " &c. was purged; because, after being sold by the defender Mr. C. " Graham, they were again acquired by virtue of certain excambions under

ordered cases, and afterwards (2d February 1837) ap-

" 10th Geo. 3. It is enough to say that part of them was not recovered " by these excambions, and farther, and what is still more material, it is " impossible to purge one irritancy by committing a second irritancy, for " the lands excambed under the statute were themselves part of the en- " tailed estate.

" The defence upon which Mr. C. Graham's creditors mainly rest is, " that although an irritancy be declared against him, it will not affect " their debts made real upon the entailed estate by conveyances, heritable " bonds, or adjudications on which infeftments have followed, before a " decree of declarator of irritancy has passed against him, these incum- " brances being restricted to his life interest in the estate. A principle " at one time obtained in our law, that the deed of a proprietor infeft must " affect, ex necessitate juris, the fee of his estate, to obviate which in the " case of entails irritant and resolutive clauses were devised, by which " the fee was held to be forfeited in the person of the contravener by " virtue of the irritant clause before the right which he had granted was " annulled by the resolutive clause. According to this presumption or " fiction, every deed of the contravener after his contravention, though " not prohibited, or even although permitted by the entail, ought to have " been avoided, on the maxim resoluto jure dantis resolvitur jus acci- " pientis. But the fiction itself was absurd, as has been often demon- " strated, and if followed out to all its consequences would have been " unjust and mischievous. Accordingly, for more than a century it has " been settled law, that every deed of the heir in possession, permitted " or not prohibited by the entail, is valid though done after a contraven- " tion, but before decree of irritancy; for example, provisions to wives " and children, leases for an ordinary term of endurance, feus under a " permissive clause, and the like. But it never was pretended that an " act of contravention could be effectual because it was committed before " a previous contravention had been declared. The question, therefore, " in the present case is reduced to this: are the debts which have been " made real on the estate of Gartmore by the infeftments of the creditors " or their trustee contraventions of the entail, or not? The creditors " maintain the negative, on the ground that their infeftments are not " absolute, but defeasible on the death of Mr. C. Graham, and they refer " to the case of Nairn v. Gray.[1] But the entail of Gartmore prohibits " all incumbrances, without distinction as to the period of endurance by " the ordinary clause against the contraction of debt. In equity, indeed, " it has been held that if an incumbrance, though prohibited, does not " encroach on the rights of the next substitutes, they have no interest, " and therefore no title to challenge it, and on that ground a trust-deed, " an adjudication, or heritable bond has been thought valid, provided its " endurance is commensurate with the right of the heir in possession. " But it is obvious that the right of the heir in possession does not neces- " sarily subsist during his life; it terminates not only by his death, but " by a decree of irritancy. There is no equity, therefore, in holding, nor

[1] 15th Feb. 1810, Fac. Col.

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pointed the whole papers to be laid before the other

" has it ever been held, that any incumbrance not defeasible on either of " these events is not a contravention, and therefore every substitute has " both interest and title to challenge it if not so restricted. The case of " Nairn seems to have been misunderstood; it was not a declarator of " irritancy. The question occurred in a competition of creditors, and " resolved into this: whether a heritable bond granted by Mr. Gray, the " heir of entail in possession of the estate of Carse, to Mr. Fletcher, and " afterwards assigned to Sir William Nairn, was or was not a real security? " The bond declared that it should not be held to affect the lands for a " longer period than the granter's lifetime, and that it should not be " ' interpreted or extended to infer any infringement upon or the incur- " ' ring of any of the irritancies contained in the said deed of entail, or " ' any derogation therefrom in any manner of way whatever.' In vir- " tue of that clause, therefore, Sir William Nairn's infeftment was clearly " defeasible, not only on the death of the heir, but when his right to the " estate terminated by a decree of irritancy or otherwise. But the per- " sonal creditors maintained, that as the security was declared by this " clause to be such as did not infer an irritancy, and as every real security " was prohibited, therefore the infeftment was not a real security. The " Court overruled that plea, on the principle already explained, that while " the heir's right subsisted no substitute was entitled to challenge a " security, even although it were real and falling under the words of " the prohibition, because it could not at that time operate to his pre- " judice.

" In the present case the trust deed granted by Mr. C. Graham in " favour of his creditors, some of whom appear in this action, contains a " clause exactly similar to that which occurred in the heritable bond in " the case of Nairn, declaring that the infeftment should not prejudice " the heir of entail succeeding to Mr. C. Graham in the estate, nor affect " his right to the lands, nor the rents falling due after his death, nor be " further binding on him in regard to the said lands and rents than is " consistent with the entail. It does not appear whether all the other " securities contain clauses to the same effect. If they do, they are in " terminis void when an irritancy is declared. If they do not, they are " incumbrances prejudicial to the rights of the substitutes, and therefore " contraventions which can have no support in equity. It may be added, " that the law then laid down, that a substitute has no title to challenge " a contravention unless it be prejudicial to his interest, though very ex- " pedient in practice, may be questioned on principle. There may be " various conditions in an entail, such as that the heir shall bear the name " and arms of the family, shall reside in the kingdom, and the like, " which a substitute has no interest to enforce, except that they were the " injunctions of the entailer, and on their being violated that his own " right to the estate has opened. Be this as it may, it is clear that " equity can never interpose to support the right of creditors holding real " securities expressly prohibited after the right of the heir who granted " them has been extinguished."

judges, with a view to a hearing before the whole court.

The Lord Ordinary, when the cause came to be heard, made the subjoined explanation to the court.[1]

[1] *Lord Corehouse.*—" I think some misunderstanding exists as to the " import and effect of my interlocutor, and that it has been construed in " a sense which I never meant it to bear, and which I do not conceive it " can bear; but if it can, it should be altered and qualified. The action " is a declarator of irritancy, directed solely against the heir in possession, " concluding to have certain acts of contravention declared against him, " and his right to the estate declared to be forfeited. Such an action is " often combined with a reduction improbation, setting aside convey- " ances to purchasers or securities granted in favour of creditors. But " this action contains no such conclusion, and on the contrary, the sum- " mons, in express terms, 'reserves all right of challenge competent to the " 'pursuers for reducing and setting aside' such conveyances. By neces- " sary implication, the right of creditors and purchasers was also reserved " to state their defences against such challenge, when it should be " brought. Under this action, though the contravention by the heir was " declared, and his right to the estate forfeited, it does not follow the " rights of creditors must be set aside. They may have various de- " fences. The entail may have been defectively recorded; the pursuer may " be barred, personali exceptione, from challenging their rights, though " not from setting aside the right of the heir in possession, or there may " be other defences. It is therefore an erroneous assumption, as it " appears to me, that a decree in terms of this libel, which expressly " reserved the rights of creditors for future challenge, should be held to " have the effect of sweeping away the rights granted to these creditors, " or declaring them to have been malâ fide possessors since the date of " citation in this action. No such decision has yet been pronounced. " The judgment under review is no such decision; and supposing that a " reduction improbation is still to be brought for rescinding their secu- " rities, it may perhaps be found that their bona fides did not cease " until citation, or even until decree in that action. The question of " their bona fides, as well as their other defences, is not disposed of, and " as it seems to me cannot, by the frame of the summons, be disposed of " in the present action. These misapprehensions of the creditors appear " to rest on the circumstance, that the summons concludes for declarator " that the lands, with all their rents, have devolved on the pursuer " R. C. Bontine, from the date of citation in this action, disburdened of " every act and deed of the heir in possession, as fully and freely as if he " never had enjoyed possession. Now, although these conclusions are in " the summons, according to the ordinary style of such a summons, and " although I pronounced decree in terms of the summons, it is necessary " to consider who is the party, and the only party, against whom decree

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Judgment of Court, 2d Mar. 1837.

Thereafter, counsel having been heard, the following interlocutor was pronounced in presentiâ of the whole judges:—"The Lords of both Divisions and the permanent Lords Ordinary, having heard this cause, "adhere to the interlocutor of the Lord Ordinary reclaimed against, with the exception herein-after mentioned as to the expenses found due, and refuse the "desire of the reclaiming note; reserving all questions "with regard to the validity and effect of the heritable "securities granted to or acquired by the creditors of "the said W. C. C. Graham, and to all concerned their "objections as accords: find the pursuers entitled only "to the expense incurred in discussing the question of "irritancy, and to that effect alter the Lord Ordinary's "interlocutor: of new, find expenses due to the pur-

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"is pronounced. That is the heir in possession, against whom alone the "action was raised, and against whom these conclusions, if contravention "was proved, were well founded, so that decree must have been pro-"nounced in these terms against him. It is true, that creditors have "been sisted in this action. They had an interest and title to do so, to "the limited effect of supporting every defence competent to the heir in "possession. If they could defend his right, à fortiori they could de-"fend their own. But they appeared in an action in which his right, "and the pleas competent to him alone, could be effectually discussed "and decided; leaving to all other parties to defend their own rights, "when challenged in an action directed against themselves. It would "even involve an absurdity, if the judgment under review was inter-"preted in any other way. The conclusion as to the devolution of the "lands free of every act and deed of the heir in possession, is of course so "broad and sweeping, that if it was not to be construed with reference "to him alone, it would strike not only at every right granted to a cre-"ditor, but every lease entered into with a tenant, and at all deeds of "the heir though executed under the permissive powers of the entail. "It appears to me, therefore, to be clear that the decree under review "could not possibly receive the general effect ascribed to it by the "defenders; but if there is any room for doubt on this subject, a reser-"vation should be inserted in the interlocutor, saving to the creditors, "who had sisted themselves, their defences in every challenge of their "rights which may hereafter be brought."—Rep. in 15 D., B., & M., 725.

"suers relative to that branch of the cause, and remit "to the auditor to tax the account of those expenses "and to report."

The defenders appealed.

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Appellants Argument.

Appellants.—The explanation given of the interlocutor withdraws the most important point which had been raised in the case from consideration. But there are other questions which are of material importance to the appellants, both to Mr. Graham and his creditors, in respect of which the interlocutors should be altered.

The alleged irritancy, said to be incurred by the omission to insert the provisions of the tailzie in the rights and conveyances by which Mr. W. Cunningham Cunningham Graham held the estates, extends, by the direct terms of the act 1685, to the contravener and his heirs; and hence the pursuers, who are his descendants, have neither title nor interest to insist in a declarator, which must exclude them. It is a settled point, that if an irritancy is declared to infer forfeiture not only of the right and title of the contravener, but also of his descendants or his heirs, none of his descendants can pursue a declarator of contravention against him, seeing that their title and interest is necessarily excluded. On the other hand it has been found, and most justly, that in regard to irritancies generally, that is, those which the maker of the entail creates, if he declares only that contravention shall forfeit the right of the contravener, that declaration shall not import that it is to forfeit the right of his heirs. But the very same principle requires that if the contravention is declared to work a forfeiture of the party's right, and of his heirs,

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effect must be given to that direct provision. Accordingly, when the entailer inserts the declaration against heirs as to the particular prohibitions which he introduces, effect is given to it: then how shall the same declaration in the statute not receive the same effect? The Court have found, and have assumed, for the first time, in interpreting this statute, the right of finding, that this provision, directed against a person's heirs, is to be construed directly in their favour.

The service of Robert Graham to William did not effectually take up the procuratory in the deed of entail 1767, and no valid feudal investiture was therefore made up under that deed. The question which involves the validity of this service was considered by the Court in the case of Colquhoun v. Colquhoun, July 1831[1], under the remit from this House. In consequence of William Graham predeceasing the testator, Robert ought to have completed his title as conditional institute in the manner pointed out in the opinion of the consulted Judges in Colquhoun, instead of proceeding, as he did, by service. The deed no doubt appears to have been recorded in the register of tailzies, but such registration, the deed remaining in the grantor's hands, is not, it is apprehended, equivalent to delivery, and cannot be held to be intended to deprive the grantor of the power which he would otherwise have retained over his own deed, especially as that deed contains within itself an express power of revocation.

The charter 1776 was not a renewal of the entail 1767, on which the summons is founded, but was a new investiture, essentially different from that entail, forming a new and separate entail of itself, which was never re-

[1] 5 Wilson & Shaw's Appeal Cases, p. 32.

corded; and hence the lands are not protected against the rights of creditors, nor is the pursuer entitled to enforce the same. The interlocutor of the Court, based upon the opinions of the consulted Judges, consists of two propositions: 1st., that the Crown charter 1767 was framed in conformity to the deeds of entail 1767 and 1774; and 2d., that the entail in that charter is the same with each of these entails. The difficulties of the case, so far from being solved, are avoided by these propositions. A charter may be framed in conformity to two deeds, and yet not be the same as each separately, and so it accordingly happens in this case. The charter 1776 included the lands entailed by the deed 1767 and the lands included in the deed 1774, but the charter 1776 is so framed as to mass the lands together and the entails together, and thus, among other inconsistencies, makes a contravention under the deed 1774 operate a forfeiture of the lands entailed by the deed 1767, and vice versâ. The provisions, in short, are indiscriminately applied to the two sets of lands, as if they had been but one estate and originally included in one entail. From the manner in which the charter 1776 is framed it is only by doing by construction, or rather by implication, what the charter has not done, (namely, applicando singula singulis, with the view and for the purpose of effectuating the supposed intention of the party,) that a contrary result can be arrived at. Consistently, however, with the decisions regulating the interpretation of entails, it is impossible to allow a substitute to adopt such a principle and to carry it through every part of the deed. Ex facie of the deed the intention of Robert Graham appears to have been the very reverse of what

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is assumed; his intention plainly appears to have been to have one estate and one entail. Intention, however, cannot in any case be pleaded against creditors; and how is the intention to be collected in this case? Not by reference to deeds recorded in the register of tailzies, with which alone creditors have to do, but by reference from a recorded deed of entail to another and unrecorded deed of entail, which, as regards the rights of creditors, is a mere dead letter.

The procuratory of resignation executed by Robert Graham in 1779, by which he resigned the whole lands and estate contained in the two deeds of 1769 and 1774 as one estate into the hands of the Crown, as his superior in the lands, and obtained a new charter conveying to him all these lands, proves the intention of Robert Graham to have been, that they should be considered and held as one estate, to which all the irritant and resolutive clauses contained in the procuratory of resignation and the charter should be applied as an unum quid, and that they should be possessed accordingly.

The execution of the procuratory of 1779, by which the estate and lands contained in the two deeds of 1767 and 1774 were resigned into the hands of the Crown, in order that a new infeftment thereof might be granted of them as one estate to and in favour of a different series of heirs from that contained in either of the two entails of 1767 and 1774, (upon which procuratory a new charter was expede in the same year, under which the subsequent titles of and investiture in the property have been made up,) created a new entail, upon which prescription has run; and as that entail was not recorded in the register of entails, the estate was not protected

from the onerous deeds or adjudging creditors of the heir in possession.[1]

The apparent heir of entail in possession has not committed any act of contravention, and therefore he ought to have been assoilzied from the action. The allegation contained in the record is that the appellant, disregarding the entail, made up titles to the lands of Gartinstarry and the lands of Garchell in fee simple, and alienated these lands, which are said to have been validly entailed by the deed of 1767; and that, having thus disobeyed the provisions of the deed, he has forfeited his right to the estate of Gartmore and others comprehended in the entail. The appellant has all along denied that these estates were validly entailed, or competently brought under the fetters of the deed of entail; and therefore admitting the statement as to the mode in which he made up his titles to be correct, and that the acts of alienation were done by him, still no forfeiture of the estate has taken place or can be declared.

In the first place, as to the lands of Gartinstarry, the question is, whether the entail has not prescribed by the appellant being entitled to refer his possession, and that of his predecessors, to the unlimited title which they possessed? This, therefore, is a question of double title; and if the heirs of entail might ascribe their possession to the fee-simple title, then the entail was worked off by the effect of the long prescription. It is a well known principle of law, that where a party has two titles in his person, the one limited and the other unlimited, and can ascribe his possession to the unlimited title, the

[1] Bell on Comp. Title, 236; ibid, 242; 1 Jurid. Sty. 81; Stair, b. iii. tit. 2. s. 8.; Ersk., b. ii. tit. 7. s. 22.; Sandf. Entails, 60; Broomfield v. Paterson, 29th June 1784; see Sess. Papers.

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limited title is held to be worked off. If possession has taken place upon or can be ascribed to an unlimited title existing in the person of an heir of entail for a period of forty years, without the deed of entail having been made the lex feudi by infeftment following upon it, then the fetters of the entail are worked off, and the fee-simple title only remains.[1] Independently of the general doctrine, the right of the heirs under the fee-simple title was expressly preserved by the words of the deed of entail itself; it declares that the heirs of entail shall "bruik and enjoy" the estate in virtue of the deed of entail, "or in virtue of any other right possessed by "the entailer."

In the second place, as to the lands of Garchell, it is admitted by the respondents that the decree reducing Nicol Graham's infeftment was pronounced, but its merits are called in question. That, however, has nothing to do with the present point. The decree, until challenged and set aside, is a good decree, and remains now a valid and unchallenged judgment of the Court, reducing and setting aside the infeftment taken by Nicol Graham in 1758. The result of that judgment was, that the only title to the property which remained was the disposition by Mary Hodge in 1708, unfeudalized. The infeftment of Nicol Graham being set aside, his title and that of the subsequent heirs to the lands was the personal right created by Mary Hodge's disposition in 1758. In this, the legal situation of the titles, Nicol Graham executed the deed of entail of 1767. He had then a feudal and complete title to the superiority, and he possessed the

[1] M'Dougal v. M'Dougal, 10th July 1739, Mor. 10947; Smith v. Bogle and Gray, 30th Jan. 1752, Mor. 10803; Dalzell, 17th Jan. 1810, Fac. Coll.

dominium utile upon his personal right, as heir apparent to his father under the disposition of 1708. Now there is no proposition in the law of Scotland more clear upon feudal principles than this, that where a party possesses the separate estates of superiority and property under different titles, he has separate and distinct estates in his person, which he possesses in the respective characters of superior and vassal. The doctrine of ipso jure consolidation, arising from the mere fact of one party possessing the two estates, which appears to have at one time been supported by some of the more ancient feudalists, has been put an end to by the decisions of a more recent period, upon a mature consideration of the authorities[1]; and the appellants, therefore, admit their surprise at the countenance which this doctrine has received from the opinion of the Lord Ordinary, as expressed in his note. But the Lord Ordinary likewise says, that having been consolidated, they were not afterwards separated "by the unmeaning act" of the entailer in taking infeftment upon the precept contained in Mary Hodge's disposition. The appellants are at a loss to understand what the Lord Ordinary intends by stating this to be an unmeaning act. If the entailer had intended to consolidate the dominium utile with the superiority, he would have executed a procuratory of resignation ad remanentiam in his own hands; but the fact that he took infeftment upon the precept, and afterwards granted a charter of confirmation in his own favour, shows his meaning, and proves the legal intention to keep these estates separate.

It is therefore confidently submitted, upon this part of the case, that the lands of Gartinstarry are not

[1] Bell's Princ., 2d edit., 206; Bell's Compl. Title, 314; Bald v. Buchanan, 8th March 1786, Mor. 15084; Lord Moncreiff in Elibank v. Campbell, 21st Nov. 1833.

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affected by the entail; that the deed of entail did not apply to the dominium utile of the lands of Garchell, that the dominium directum only was entailed; and that, as this is a question of irritancy, there is no room for inquiring into the intention of the entailer, the conditions of the entail having been literally fulfilled.

Respondents Argument.

Respondents. — With regard to the first plea maintained on the other side, which is of a preliminary nature, it is to be observed that it has not been stated that in terms of this particular tailzie a contravener forfeits for his descendants as well as for himself; the argument is founded exclusively on the statute. It could not have been so stated, for not only is there no declaration that any other than the person or persons contravening shall incur a forfeiture, but the entail contains a declaration that "it shall be lawful for the next "heir of tailzie who would succeed if the contravener "were naturally dead, albeit descended of the contra-"vener's own body, to purge and obtain declarators "upon the contravention," &c. The statute 1685 authorizes the lieges to entail their estates, "with such "provisions and conditions as they shall think fit," so that it is optional for the maker of an entail to extend the forfeiture, in cases of contravention, to the descendants of the contravener, or not, just as he may think proper; and accordingly it has been decided that the question whether the irritancy does truly extend to the heirs of the body of the contravener must always depend upon the particular form of words in which the deed is expressed.[1]

[1] Simpson v. Horne, 6th Jan. 1697, Mor. 15353; Creditors of Gordon, 14th Nov. 1749, Mor. 15384.

The only question brought up for judgment is purely and exclusively a question inter hæredes. There is no longer, at least in hoc statu, any dispute between the respondents and third parties. In truth, considering that the only party originally called as a defender was Mr. Graham himself, the heir of entail in possession,—that the sole object of the action was to declare that Mr. Graham had done certain acts in contravention of the entail, in respect of which he individually had "incurred an irritancy of and amitted, "lost, and forfeited all right, title, and interest" under the entail,—and that finally, as regards the effect of such contravention and irritancy upon the rights and interests of creditors and third parties, all challenge was on the very face of the libel expressly reserved for some future stage of proceeding, it is very plain that the present case ought never to have been complicated by the introduction of any such extraneous topic.

The appearance of the creditors in the action would, indeed, not have been permissible at all but for the collateral and indirect interest which they had to see that the defence, competent to their debtor in his own person, was not neglected.

The question being thus reduced to a simple question inter hæredes,—to a question, that is to say, between Mr. Graham, the heir of entail in possession, who is alleged to have contravened the entail, and the respondents, the substitute heirs of entail, who, founding on the express conditions of the entail, are seeking in respect of this contravention to declare an irritancy and forfeiture of Mr. Graham's right, the grounds of defence are clearly untenable.

That defence is in all its branches rested upon the

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assumption that the case falls within the strict operation of the statute of entails, 1685, c. 22. But viewing the question as a question inter hæredes, this is a mistake.

It is very true that an entail, in order to be protected against singular successors and onerous third parties, must be brought literally and in all points within the statutory provisions. It must be recorded in the register of entails. Its conditions and fetters must be engrossed in the infeftment, and that infeftment recorded in the register of sasines. It must be perfect and complete in its clauses, prohibitory, irritant, and resolutive. But as among the heirs themselves this is not necessary. On the contrary, if there be any point fixed in the law, it is that inter hæredes nothing of the kind is required.[1]

But even as against singular successors, the decision in the Stormont case ruled, that where in addition to a prohibitory and resolutive clause the entail was still further fenced by an irritant clause, thus declaring not merely the right of the contravening heir forfeited and resolved, but the right granted to the singular successor also null and void, the entail was to all effects good and operative at common law. In this respect, perhaps, the statute 1685 may be more properly said to have been enacted with a view to fix the law and to clear it from doubt, rather than as having itself originated any new law. But be this as it may, it is plain that neither under the Stormont decision nor the statute was the irritant clause ever held to be essential, except as in the question with singular successors. The irritant clause

[1] Cathcart v. Cathcart, 18th July 1831, 5 W. & S. 345; Ersk., b. iii. tit. 22. ss. 23. 38. 39.; Lord Cringletie in Porterfield case, 5 W. & S. 542.

was introduced to afford the means of re-vindicating what the singular successor would otherwise have been enabled to carry off. But without any irritant clause, though what was conveyed to the singular successor could not be brought back, it was sufficient inter hæredes to forfeit all remaining right in the heir contravening, by the mere force of the entail itself, as embodying the condition of the grant by which he holds.

It is only necessary, therefore, that the entail 1767 be still a subsisting deed, in order to entitle the respondents here to succeed as in a question inter hæredes. In this respect they are precisely in the same predicament as if the investiture 1778 had never existed at all.

If the appellants be right in maintaining that prescription has run upon the investiture 1778, it would in that case follow, holding the investiture 1778 to constitute an adverse entail to that of 1767, that the respondents would be no longer entitled to fall back upon this last-mentioned entail. The objection, however, would not in such a case be, that the entail 1767 was defective as not having been duly completed under the statute, but that it was utterly and for ever extinct as a title of possession at all, and that the new entail, constituted by the investiture 1778, had come in its room, and now entirely superseded it.

But as regards this new ground of objection, it will be observed, that the prescription necessary to carry through the appellants argument has been interrupted by the minority of the respondent. Further, it is difficult to see how Mr. Graham, as the heir of the investiture 1778, can plead prescription upon that investiture,

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for it in græmio refers to and acknowledges the deed 1767 as its own warrant. Moreover, prescription could not possibly have run in Mr. Graham's favour against the entail 1767, seeing that so late even as 1799 he not only claimed to be served, but was actually served as "nearest and lawful heir of tailzie and provision" to his father under that very entail, "cum et sub conditio-"nibus, provisionibus, declarationibus, reservationibus, "clausulis irritantibus et resolutivis inibi specificatis." What effect any deeds that he may have in the meantime granted, or any debts or obligations that he may have contracted in favour of third parties, may be entitled to in a question with these third parties, is not here the question. Indeed the more effectual these shall be found to be, just so much the more clear and undoubted has been the breach of his obligation and the contravention of the entail on Mr. Graham's own part, and just so much the stronger and more undeniable is the appellant's right, as next substitute heir of entail, to have Mr. Graham's right to all that remains of the estate declared irritated.

This latter observation affords also a conclusive answer to an objection raised upon the ground, that certain portions of the entailed estate have never been habilely brought within the entail by proper feudal investiture. It is said, for instance, as to the lands of Gartinstarry, that prior to 1814 no title was made up to them at all, and that in the interval they were possessed upon apparency alone. But in a question with the appellant this is nothing to the purpose. His obligation to possess them under the entail is admitted. He could not take the other entailed lands, except upon the condition that Gartinstarry and every other subject

which Nicol Graham, the maker of the entail, had included in the original bond of tailzie as integral portions of the estate to be entailed, and which he had accordingly bound himself and his whole heirs, as well of tailzie as of line, to bring within and to possess under the entail, should be dealt with as part of the entailed estate. The appellant, by his acceptance of any part of the entailed lands necessarily represented Nicol Graham in this obligation to entail all the rest; and whether, therefore, the title to a particular subject was or was not feudally completed in his person as heir of tailzie, he equally contravened the provisions of the entail, and equalled forfeited his whole right to the entailed estate, when, in despite of the entail, he completed an adverse and independent title in such a subject as Gartinstarry, as if he had in the first instance made up his title thereto under the entail, and thereafter disposed of it.[1]

The same observation applies in the case of Garchell, supposing that the appellants objection, as regards the dominium utile of these lands, is not met by a sufficient answer upon a totally different ground. The separate answer to which the respondents here refer, and which as to Garchell is altogether conclusive, is, that the dominium utile was effectually consolidated with the dominium directum of these lands by force of a double prescription; the one completed antecedent to the making of the entail, which would necessarily have the effect to include within the entail, even in its original constitution, the entire and consolidated plenum dominium of Garchell, both property and superiority; the other having

[1] Carmichael, 15th Nov. 1810, Fac. Coll.; Oliphant Murray, 17th Jan. 1811, Fac. Coll.; Smyth, 9th Dec. 1814, Fac. Coll.; and see Campbells, 6th Feb. 1821, Fac. Coll.

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reference to the subsequent possession under the entail, and being of itself, and independently of the first, sufficient to bring the dominium utile within the entailed investiture, by consolidating it with the entailed dominium directum, even though itself not originally included.[1]

The whole law in this matter both as to Garchell and Gartinstarry is laid down in the note to Lord Corehouse's interlocutor of 3d February 1836.

The opinions of the consulted judges contain a complete answer to the objection, that the provisions of tailzie and irritant and resolutive clauses in the subsequent charters are not the same with those which are contained in the deed of tailzie 1767.

Ld. Brougham's Speech.

Lord Brougham.—My Lords, this was an action of declarator, prosecuted by Robert Cunninghame Bontine, Esq., of Ardoch, William Cunninghame Graham Bontine his son, and Charlotte Fitzwilliam Bontine his daughter, and by Robert Cunninghame Bontine as administrator in law for his children, against William Cunninghame Cunninghame Graham, Esq., of Gartmore.

The questions principally made were, in the first instance, whether the entail in the charter and seisin of 1776 is the same with or different from the entails of 1767 and 1774; and as it is admitted that there is some diversity in the fencing clauses, the next question was, how far this diversity affected questions between heirs, and questions of the heir with creditors?

All the Judges, both those of the Second Division and the permanent Lords Ordinary, were agreed, with

[1] Elibank, 21st Nov. 1833, Fac. Coll.; Middleton, 22d Dec. 1774, Mor. 10,946; Walker, 27th Feb. 1827, Fac. Coll.

only some difference as to the grounds of their opinion, and the Judges of the First Division also unanimously agreed, in the interlocutor of the 12th June 1835, finding that the lands held under the entail of 1767 are effectually secured against William Cunninghame Cunninghame Graham's debts and deeds, and that the entail is binding and effectual against him in questions with the heirs of tailzie.

Upon the foot of this interlocutor the case then went back to the Lord Ordinary, and his interlocutor was pronounced after hearing not only the parties hitherto before the Court, but certain creditors of William Cunninghame Cunninghame Graham, who are now respondents with him here, and who, as appears by a minute of compearance (given in the papers, but without any date), claimed to be made defenders as having obtained real security over the property in question. The security was by assignment from the original grantees of an annuity with a heritable bond, on which they were infeft for the life of the grantor, William Cunninghame Cunninghame Graham. It covered, then, or assumed to cover, his (William Cunninghame Graham's) life interest in the property.

The whole Judges of both Divisions and whole Lords Ordinary affirmed the interlocutor of the Lord Ordinary of the 3d February 1836, upon the argument which was thus raised by the parties, with the exception of some part of the finding as to costs, which they held should be confined to those of discussing the question of irritancy, and not those incurred in the first stage of the cause; and further with the addition of a reservation to be afterwards more particularly mentioned.

The finding, as regards the irritancy, was, that the

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irritancy had been incurred by William Cunninghame Cunninghame Graham in alienating and putting away all the lands which he had alienated and put away (reciting them), all being in the entails of 1767 and 1774; and the decerniture was in terms of the libel. Now the libel sought to have it declared that William Cunninghame Cunninghame Graham had contravened by not engrossing the conditions and clauses in the titles which he made up, and by alienating or contracting debt; and also that his right was forfeited from the date of the citation, to the next substitute, free and disburdened of his acts. It is, however, to be observed, that there is another thing asked, namely, a reservation of all right to the substitutes to reduce and set aside the conveyances and rights granted by William Cunninghame Cunninghame Graham to disponees, and all heritable securities granted over the lands or any part thereof.

The whole question was evidently inter hæredes, and the creditors were in Court only to see that their debtor William Cunninghame Graham really defended his own right; not at all to protect any rights which they might have independent of him and different from his. Whatever interest they had in his maintenance of his own right they were in Court to protect; whatever peculiar grounds were competent to them as third parties, and independent of him, did not come within the scope of this proceeding, and could not be dealt with by any judgment to be given in the suit. It appears, however, that the separate case of "the cre- "ditors" was argued before the Lord Ordinary and afterwards before the Court; but a reservation was inserted, in the interlocutor of affirmance, of all questions on the validity or effect of the heritable securities

acquired by the creditors, in order to show more distinctly that the whole question dealt with by the Court and disposed of in the judgment was inter hæredes. Their Lordships appear from the report to have thought this reservation unnecessary, but it must have been inserted to prevent all possibility of cavil.

The questions principally discussed below in the second stage of the cause were these three, besides the one thus reserved; and the matters connected with these alone, as regards this branch of the discussion, are brought here by appeal: — First, whether, the fetters having been omitted by William Cunninghame Cunninghame Graham in making up his title, and an irritancy thus incurred by him, the pursuer is not also deprived of all title by the statutory provision that the party not inserting the fetters in his title forfeits for his heirs as well as for himself? Secondly, whether an irritancy was incurred as to the lands of Gartinstarry and Garchell, said not to be covered by the entail? Thirdly, whether if an irritancy as to one parcel (Garchell) was incurred, it was not purged by an excambion whereby that parcel was re-acquired; but re-acquired by exchanging other lands entailed and not within the scope of the second question? Fourthly, whether the forfeitures extended to the whole life interest of the contravener, so as to defeat the rights of the creditors in whom security over that life interest had been vested by his acts, and made real by infeftment before decree in the declarator of irritancy.

This fourth question (which seems, when viewed in one way, like asking if, where there is a shifting use, its operation during the life estate of the party in whose time the event happens can be defeated by a previous

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assignment of his life estate, but in another light is subject to much more doubt) does not now arise, nor indeed ever did; it has been withdrawn expressly from the cause by the reservations in the third and last interlocutor under appeal.

On the other three questions we have the unanimous opinion of twelve[1] of the learned judges in the Court below against the defenders and appellants. It is therefore the less necessary to enter at length into the detailed examination of the arguments. Respecting the first it may be observed, that the entail contains no clause forfeiting for the heirs of the contravener; on the contrary, it is plainly implied that these heirs may become entitled on a forfeiture being incurred. The next heir of tailzie is spoken of as succeeding in that event, "albeit descended of the contravener's body." It has been decided in an old but leading case, that heirs need not be exempted by express words in order to save them from the forfeiture, and there can be no reasonable doubt that the provisions of the act of 1685 (on the words of which alone this argument for the appellant rests) must be taken with reference to the clauses of the entail itself, clauses which the act gives entailers the power in express terms to affect their property with.

As to the second point, the ipso jure consolidation of the superiority with the dominium utile of the lands of Garchell, by the possession of both for above forty years before the entails of Nicol Graham, seems to be satisfactorily established. Besides, the subsequent possession under these entails was justly regarded as of great

[1] Lord Glenlee was absent at last advising.

importance. On that part of the argument which relates to Gartinstarry in particular it may be observed, that although the intention of an entailer is not to be raised by implication as to the creating of fetters, it may be gathered from necessary intendment respecting the directions as to the title under which the heir is to possess; here the meaning plainly was contrary to the sense sought by the defenders (the appellants) to be put on the words "or any other right that I may have "in my person," these words being manifestly used for the purpose of preventing the heir from avoiding in any way to represent the entailer.

Ld. Brougham's Speech.

The answer given to the third point enumerated seems decisive, that one act of contravention never can purge the irritancy arising from another.

The unanimous judgment of the Court below ought therefore to be affirmed; and as there seems to have been no good reason why the appeal should be brought after the reservation inserted in the interlocutor, and which left nothing in dispute about which there had been any difference among the learned judges as to the conclusions arrived at, the affirmance should be with costs.

LORD CHANCELLOR.—My Lords, I concur in the opinion expressed by my noble and learned friend; I cannot help thinking that if it had not been for some apprehension that the claims of the creditors had not been protected, this case would not have been brought to your Lordships bar, but it is quite clear that their interests were sufficiently protected.

Ld. Chancellor's Speech.

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Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

[7*th August* 1840.]

The UNIVERSITY of GLASGOW, Appellants.[1] (No. 18.)

[*Attorney General* (*Campbell*) — *Sir W. Follett.*]

The FACULTY of PHYSICIANS and SURGEONS, Respondents.

[*Lord Advocate* (*Murray*) — *Dr. Lushington.*]

Corporation — Penalty — Costs. — Held (affirming the judgment of the Court of Session pronounced on a remit from the House of Lords), (1.) that the Faculty of Physicians and Surgeons of Glasgow are a corporation; (2.) that the adjection of a penalty in the grant of a corporation, for contravention of corporate privileges does not preclude the corporation from the benefit of an interdict; and (3.), that costs in the House of Lords were properly awarded by the Court of Session to the respondent under an authority on remit to determine the question "of the respondents costs, "relating to this appeal."

Sequel of the case in Shaw and M'Lean, vol. ii. p. 275.

2D DIVISION.

Lord Ordinary Medwyn.

Statement.

ON the 28th of August 1835 the House of Lords pronounced the following judgment: — "It is ordered "and adjudged by the Lords spiritual and temporal in "parliament assembled, that the said cause be remitted "back to the Second Division of the Court of Session "in Scotland, with directions to the Judges of that "Division to consider, and to take the opinions of the "whole Judges of the Court of Session, including the "Lords Ordinary, whether the respondents, as the

[1] 12 S., D., & B., p. 9; 15 D., B., & M., and Fac. Coll.

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" Faculty of Physicians and Surgeons of Glasgow, are " a corporation, capable in law of possessing and in " fact clothed with the rights for which they contend in " this action? As also to consider, Whether the right " of interdict is taken away by the provision of a penalty " made in the grant or letter of gift in the pleadings " mentioned? And it is further ordered, that the said " Court do determine the question of the respondents " costs relating to this appeal, and that they have power " to recall or alter the said interlocutors appealed from."

On the cause returning to the Court of Session, cases on the points remitted for consideration were ordered to be laid before the whole Judges for their opinion, and the following opinion by the consulted Judges was returned:—

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Lords President, Gillies, M'Kenzie, Corehouse, Fullerton, Moncreiff, Jeffrey, and Cockburn.—" We have con- " sidered the remit from the House of Lords, with the " cases subsequently lodged for the parties, and the " whole process, and remain of the opinion which we " formerly gave, that the respondents in the appeal are " a corporation, capable of holding the rights which " they now claim.

" Their title is a letter of gift or charter from King " James the Sixth, dated the 29th November 1599, " which was ratified by the Scotch parliament in 1672. " Their possession of the character of a corporation and " their actings in a corporate capacity for more than " two centuries are established by documentary evidence " of the fullest and most satisfactory nature, and their " title as a corporation has not only been recognized in " various judicial proceedings, but specially found and " declared by this Court in an appropriate action " brought for that purpose.

"The case of the appellants, as it appears to us, "derives its only support from the principle which they "have adopted of laying entirely out of view the law "and practice of Scotland with regard to corporations, "and substituting in its stead the law and practice of "England in that matter, not as to one point only, but "almost every point which they have had occasion to "raise. It is true that the corporation law of Scotland "has a general resemblance to that of England, as it "has to that of many other countries in Europe, for "the nature and object of these institutions are the "same in all, being originally derived from the civil "law, and afterwards modified by feudal rules to suit "the form of government and state of society and "manners when that system sprung up. But, notwith-"standing this general resemblance, the law of each "country in details and matters of form has its pecu-"liarities, and in none are they more remarkable than "in our own law as contradistinguished from that of "England.

"Before examining the grant of King James the "Sixth, the appellants suggest a doubt whether the "term charter is not improperly applied to it, because "it passed under the Privy Seal, and not under the "Great Seal. This seems to be of little moment, "because there is no question what the document is to "which both parties refer. We may remark, however, "that it forms no part of the definition of a Scotch "charter that it is a writ passing under the Great "Seal. Taking the term in its most restricted sense, "namely, a grant of land, or other heritable right, "from a superior to a vassal, nine tenths of the charters "in Scotland not only do not pass under the Great "Seal, but they pass under no seal at all. With regard

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" to the more extenisve and appropriate use of the term, " it is employed as a synonyme for literæ patentes or " patent letters, in contradistinction to literæ clausæ or " close letters, under whatever seal they pass, or whether " they are sealed or not. If King James's grant had " been directed to Messrs. Low and Hamilton exclu- " sively, or even to them and their brethren in suc- " cession exclusively, the letters would have been close, " and could not with propriety have been called a " charter. But the letters are patent, for they are " addressed by the King, not to those individuals, or to " the Faculty of Physicians and Surgeons, but to all " provosts, baillies of burghs, sheriffs, &c., within cer- " tain bounds, 'and all and sundrie otheris our leidges " 'and subjectis whom it effeirs, quhas knowledge thir " 'our letteris sal cum,' that is, omnibus probis homi- " nibus totius terræ suæ, the precise formula of a Scotch " charter ever since the days of King David the First. " Even letters of deaconry, by the magistrates and council " of a burgh, or a lord of regality, by which corporations " are often constituted, by virtue of a delegated power " from the Crown, being letters patent, are rightly " termed charters; accordingly, in the documents and " pleadings, to which the parties in this case have " referred, during a period of more than a century, " this grant has been indiscriminately termed a gift, a " patent, and a charter. We have alluded to this, not " because it bears upon the merits of the question, but " because it shows how unsafe it is to apply the law or " forensic language of England to a Scotch case, even " where there is a general analogy or resemblance.

" The charter is granted in favour of Mr. Low, the " King's surgeon, and Mr. Hamilton, professor of me- " dicine, that is, physician, 'and their successors, in-

" 'dwellers of our citie of Glasgow;' and it gives them " power to convene before them all persons professing " or using the art of surgery within certain bounds, that " is, within the burgh of Glasgow, Lanarkshire, Renfrew- " shire, Dumbartonshire, and Ayrshire; to examine them " upon their literature, knowledge, and practice; to ad- " mit and authorize them, if they are found qualified; " to debar them, if otherwise, and to fine them, if they " are contumacious, by a judgment, on which letters " of horning are directed to pass. Power is given to " Messrs. Low and Hamilton, or the visitors, with the " advice of their brethren, to make statutes for the " common weal of the subjects anent the said arts, that " is, surgery and medicine, and to punish the breakers " of them; and various duties are imposed on the " visitors, indwellers of Glasgow, professors of the said " arts, and their brethren, present and to come. " Lastly, the magistrates, sheriffs, and other ministers of " justice, to whom the letters are addressed, are or- " dained to assist and defend the visitors and their pos- " terity professors of the said arts, and to put the grant " into execution.

" The appellants maintain that there is no corpo- " ration constituted by this charter, and, therefore, that " the respondents have no persona standi in judicio, " that is, no title to sue or to be sued as a body. This " plea is rested on various grounds.

" First, It is said that a special denomination is one of " the essentialia of a corporation; that where it is erected " a name must be given to it; that the King must bap- " tize it; and that the name thus given is indispensable " to its existence. In support of this doctrine passages " from Coke, Blackstone, and Kyd are quoted, excellent " authorities, undoubtedly, as to the law of England,

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" but not one of these learned authors says that it is " also the law of Scotland. Whatever may be the " form by which a corporation is baptized in England, " nothing is requisite with us but a grant from a com- " petent authority, bestowing corporation privileges on " a set of persons in existence, and their successors of a " certain description. It will throw light on this point, " and indeed on every point which the appellants have " raised in this branch of the cause, to consider the way " in which corporations anciently came to be erected in " the royal burghs of Scotland, and the style of the " writ issued for that purpose.

" It appears to have been an early practice for the " various trades within burgh to form voluntary societies, " for regulating their business and for raising a fund by " the contribution of their members. Those societies " laid down rules respecting the trial and admission of " masters, the number and fees of apprentices, the " mode in which the trade was to be carried on, and " the like. Further, they were in use to appoint offi- " cers to collect their funds, which, before the Refor- " mation, were for the most part applied to defray the " expense of an altar dedicated to the patron saint of " the craft, and to pay the priest who officiated there. " Thus, the surgeons of Edinburgh had an altar dedi- " cated to St. Mungo; the tailors to St. Anne; the " weavers to St. Soverane; the waukers to the Saints " Mark, Philip, and Jacob, and so forth. The officer " who had the charge of the altar was called kirk-master " or deacon (an ecclesiastical term); if he collected the " contributions he was called quarter-master, because " they were paid quarterly; and visitor, if he was ap- " pointed to examine the qualifications of the tradesmen " or the goodness of their work. But as those were

" voluntary associations only, they could not enforce " their rules, or levy the duties which they imposed, not " only in the case of a person who had never joined the " society, or who had abandoned it, but even in the " case of a refractory member, because they had no " persona standi as a body. To remedy this, it became " the practice for the trade to present a petition to the " magistrates and town council, the great corporation " of the burgh, who have in every case an express or " presumed authority delegated to them from the " Crown, on behalf of the kirk-master, quarter-master, " or visitor of the craft, and of some or all of the mem- " bers, either named or described in the petition, pray- " ing the council to interpose their authority to the " laws, statutes, and ordinances of the craft, by a grant " in favour of the petitioners and their successors, that " is, all who exercised and should exercise the trade " within the limits of the grant. If this petition was " complied with, a writ in the form of a charter to that " effect was issued under the burgh seal, which writ is " technically called a seal of cause; and there is no " point in the law of Scotland more clearly settled than " that a seal of cause so issued erects the grantees into " a corporation, and gives them power to sue and be " sued, with every other privilege necessarily incident " to a corporate body, whether expressed in the grant " or not, such as the power of electing officers, imposing " fines, making bye-laws, and the like.

" The same form was adopted by lords of regality " and barons, who had power in their rights from the " Crown to erect corporations within their burghs of " regality and barony; and it is evident from the pre- " sent charter that the same style, mutatis mutandis,

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" was adopted in the erection of corporations by the " Crown itself.

" When it is objected, therefore, that the faculty of " physicians and surgeons in Glasgow had no special " denomination given to them in King James's letter in " 1599, or, as it is quaintly said, that they were not " baptized, the obvious answer is, that the grant is made " to them as the members of a specified calling in a " specified place, that is, as physicians and surgeons, " being indwellers in Glasgow. They are baptized just " as the corporation of surgeons and barbers in Edin- " burgh were a century before, in their seal of cause, " dated in 1505. The petition in that case was pre- " sented by the kirk-master and brethren of the surgeons " and barbers within the burgh of Edinburgh, and the " grant is to them and their successors. Thus also, in " the case of the tailors of Edinburgh, the petition was " presented by John Steill, kirk-master, George Bell, " William Hockburn, and seven others named, ' and " ' the laif of the tailors' craft within this burgh;' and " the charter confirms the rules of the society ' to the " ' said masters and their successors of the said craft.' " Thus also, in the case of the butchers of Edinburgh, " the petition is given in by ' Richard Furde, deykin of " ' the fleshoris for the tyme, Robert Gray and others, " ' principall masters of the said fleshoris craft;' and " the council ratify the regulations exhibited to them, " without even naming the craft. Thus also the peti- " tion of the candlemakers is presented by Robert " Taffintoun, Andrew Galloway, and others, craftsmen " of the candlemakers of the burgh of Edinburgh, and " the seal of cause merely ratifies the regulations. In " the case of the weavers or websters the petition is

" presented in the name of ' the best and worthiest per-
" ' sonis of the hail craft of wobstaris within the said
" ' burgh.' And the council find the statutes exhibited
" ' lovable to God and holy kirk, honourable for all the
" ' realme, profitable and worship for the craftsmen, and
" ' therefore we admitt the samyn.'

" A multitude of other instances might be given of " the erection of corporations, both in Edinburgh and " in the other royal burghs of Scotland, in which the " same style was adopted at and previous to that period, " and it does not appear to have been changed till a " considerable time after the union of the Crowns, when " a more correct system of conveyancing in this depart- " ment was gradually introduced.

" It is evident that the charter in question was framed " on the same model with the seals of cause then in " use. It does not, indeed, narrate a petition presented " by Mr. Low, surgeon, and Mr. Hamilton, professor " of medicine, and the other surgeons and physicians in " Glasgow, probably because there was no voluntary " association of the practitioners of those arts in Glas- " gow, and perhaps no petition was presented by Messrs. " Low and Hamilton; but the grant is to those indi- " viduals designed or described by the arts which they " practised, and their successors, indwellers of the city " of Glasgow. No kirk-master is mentioned, because it " was subsequent to the reformation; but Low and " Hamilton are appointed visitors, the term which, after " that event, was often applied to the principal officers " of such corporations.

" The second objection taken by the appellants is, " that there are no ' incorporating words ' in King " James's letter of gift, or words which evince any

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" intention on the part of the Crown to create a cor-
" porate body. This is another attempt to substitute
" the law of England for that of Scotland. It is quite
" sufficient, by our law, that privileges are conferred in
" the grant which can only be exercised by a corporate
" body, and there is not one privilege conferred by
" King James's charter which is not of this descrip-
" tion. Thus power is given to Low and Hamilton,
" and their successors, to summon and convene before
" them all persons professing or using the art of sur-
" gery within the bounds; to pronounce decrees against
" the contumacious, on which diligence by horning and
" caption is to follow; to make statutes for the common
" weill of the King's subjects anent the said arts, and
" using thereof faithfully, that is, the King's subjects
" dwelling within the bounds; to prosecute physicians
" practising their art, not being graduates or licensed
" by the King and Queen's physicians; and various
" privileges are granted to the visitors, indwellers
" of Glasgow, professors of the said arts, and their
" successors, present and to come, analogous to other
" corporations erected by seals of cause. That there
" is no necessity for express words of incorporation
" is evident from the seal of cause granted, 31st
" January 1775, by the town council of Edinburgh
" to the weavers' craft, in which there are no such
" words. The same is the case in the seals of cause
" granted to the hammermen, to the tailors, to the
" cordiners, to the goldsmiths, and to the surgeons and
" barbers of Edinburgh, and instances to the same
" effect may be found, it is believed, in every royal
" burgh in Scotland. It was not the style of the writ
" in and before the reign of King James VI., to declare

" the grantees to be a corporation in express terms, yet " all the trades or faculties having grants from the " sovereign or from councils of burghs during that " period exist at present as corporations, and have " always acted and been recognized as such.

" Then it is said by the appellants, that perpetual " existence by succession is the essence of a corporate " character, and that this grant does not express the " mode of electing or continuing the corporate body. " We conceive that the provision for continuing the cor- " porate body is clearly expressed, and expressed in the " usual and appropriate style of the period. The grant is " to Mr. Peter Low, surgeon, and Mr. Robert Hamilton, " physician, and their successors, indwellers in the city " of Glasgow, that is, all surgeons and physicians legally " practising those arts, and residing in that city. No " person under the exceptions in the grant was entitled " to practise surgery without a licence from the grantees " or their successors, or medicine without a licence " from a university or the royal physicians; a provision, " therefore, is made for the subsistence of the corpo- " ration as long as there are surgeons and physicians " legally qualified to practise and practising their re- " spective arts in Glasgow, and actually residing there. " When Messrs. Steill, Bell, &c., and the rest of the " master tailors of Edinburgh petitioned the magis- " trates and council to confirm the rules which they " had made for the practice of the tailor craft, there " was no provision in their rules for the election of kirk- " masters or visitors, no provision for the nomination " of future corporators; neither was the council prayed " to grant a power of making other bye-laws. On that " petition the council confirm the rules presented to

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" them 'in all poynts and articles to the said masters, " 'and their successors, of the said craft, in perpetual " 'memorial in time to come.' That was the usual " form of a seal of cause in 1500, by which a succession " of corporators was provided for. So in 1517, when " Robert Taffintoun, Andrew Galloway, and the rest of " the candlemakers presented a similar petition to have " their rules confirmed, the prayer was granted in favour " of the said craftsmen and their successors, without " any farther provision as to the mode of succession.

" In the case of Wallace v. Calder[1], referred to in " the pleadings, the same objection was taken by the " suspender, Calder, to the ambiguity of the term " 'successors' in this grant. It was said, the grant " might be construed as personal to Peter Low and " Robert Hamilton and their families, provided the " successors in their families were of the profession of " the original patentees; and a great deal of discussion " followed on that plea. But the Court, although they " diminished the amount of the fine imposed on Calder, " sustained the privileges of the corporation in all re- " spects. More than seventy years have elapsed since " it was settled by a decree of this Court in foro con- " tentioso who the successors of the grantee are, and " surely it is too late now to stir the question again.

" The appellants argue, that no power is conferred " by the grant of making bye-laws to regulate the pro- " ceedings of the body, but that a power is given, and " unlawfully given, to make general laws for surgical " practice. The clause is in these terms:—'That it " 'sall be leisum to the saidis visitouris, with the advice

[1] Post, p. 423.

" ' of thair bretheren, to make statutis for the commoun
" ' weill of our subjects anent the saidis airtis, and
" ' using thairof faithfullie; and the braikeris thairof to
" ' be punishit and unlawit be the visitouris according
" ' to their falt.' It is the common style in the old
" seals of cause to represent the rules recited in them
" for regulating corporate proceedings and the practice
" of the craft as statutes made for the glory of God, the
" honour of the realm, the worship of the town, and
" the profit of our sovereign lord's lieges; and therefore
" this power of making statutes ' for the commoun weill '
" of the subjects anent the arts in question clearly in-
" cludes a power of making bye-laws for regulating the
" corporation; and so it was construed at the time, for
" the very first acts of the faculty, as appears from the
" extracts from their minute book, consist in making a
" series of bye-laws for regulating their corporate pro-
" ceedings. This expositio contemporanea of the grant
" is certainly more authoritative than any speculation
" with regard to its meaning now. Whether it em-
" powered the faculty not only to examine and admit
" practitioners within their bounds, that is, within the
" four counties named, but also to lay down rules for
" their surgical practice after being admitted, may well
" be doubted; and we are not aware whether such a
" right was ever claimed. If it had, however unlawful
" according to English ideas, it would have been no
" novelty in the law of Scotland; for by King James
" the Sixth's charter, of the 3d of January 1586, to the
" goldsmiths of Edinburgh, the corporation is ' invested
" ' with a power to inspect, try, and regulate all golden
" ' and silvern wares, not only in Edinburgh but in
" ' all other parts of Scotland, with a right to punish

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" 'offenders concerned in making adulterated gold or " 'silver.'

" It is plain, that as neither Mr. Low nor Mr. Ha- " milton, the visitors of the corporation, were royal " physicians, they and their brethren had no right by " the grant to examine and admit physicians, or to grant " licences for the practice of physic. A degree from a " university, or a licence from the royal physicians, was " sufficient for that purpose. But in the ratification in " parliament in 1672, which bears to recite the grant " of the 29th November 1599, the words quoted are:— " 'And that it sall not be leisum to any maner of " 'persones within the foresaidis bounds to exercise " 'medicine without ane testimoniell of ane famous " 'universitie wher medicine is taught, or at leist the " 'persones above mentioned, and their successors, " 'under the pains contained in the said gift.' Now it " is plain that the grant is misrecited here, for nothing " is said in it as to the grantees having a power to give " testimonials for the exercise of medicine: that was " reserved for the universities and the royal physicians. " Mr. Low was only a royal surgeon. But it has been " suggested to the House of Lords, that the Court of " Session were not entitled to say that there is a mis- " recital in the ratification 1672; that if the grant had " been to A., and the parliamentary ratification had " been in favour of B., the court had no right to say " that the legislature meant A. and not B., and that " this act, if it is good for any thing, gives the power " to the persons whomsoever it names, and not to those " whom the grant of 1599 names. The appellants have " made this suggestion to the House of Lords appa- " rently under a misconception, and a very natural one

" in England, of the nature of a ratification by the " parliament of Scotland; supposing it to be similar to " a private act of the British parliament, or analogous " to it. But in Scotland a parliamentary ratification " was not a proper law,—it carried no new right,—no " person was held to be a party to it,—it was carried " through periculo petentis, and was subject to reduc- " tion by the Court of Session. This was settled by " an act of the legislature as early as the reign of Queen " Mary. See statute 1567, cap. 18. and Sir George " Mackenzie's observations upon it. If any act of this " description, therefore, bears to ratify a preceding " grant, and misrecites it, to that extent the act is null; " and not only has the Court of Session a right to " notice this misrecital, but it is pars judicis to do so. " Perhaps a court of law at Westminster might hesitate " to find and declare that an English act of parliament, " even though a private act, was from the beginning, is " now, and will be in all time coming void, null, and " of no effect in judgment, or outwith the same. But " there is no doubt that the Court of Session can so " deal with a Scotch ratification. If the grant is in " favour of A., and the ratification in favour of B., A. " will take nothing by the ratification, but assuredly " neither will B.; for, except in so far as it corresponds " with the grant, it is unavailing, unless perhaps, when " followed by possession, it may be held a prescriptive " title.

" Doubts have been entertained whether the ratifi- " cation, being in favour of the surgeons, apothecaries, " and barbers alone, can be of any effect, now that the " barbers have withdrawn from the corporation; but it " never was held, in Scotland at least, that the existence

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" of a corporation was affected, because part of the " corporators dissolved their connexion with it. The " surgeons of Edinburgh remain a corporation though " the barbers withdrew from it in 1722; and so also " the waukers, although the bonnet-makers, who were " incorporated with them at the date of their charter, " are now a separate craft.

" Leaving the construction of the grant, we have next " to observe that few cases have occurred, if indeed any " one, in which the possession of corporation privileges " for nearly two centuries and a half has been proved " by such overwhelming evidence. It is unnecessary to " recapitulate the proof, for it is distinctly stated in the " case for the respondents. The faculty of physicians " and surgeons are found making bye-laws, and enforcing " them, as early as 1602. They appear in the course of " that century to insist in actions as a corporation, and " their title is sustained; a list is produced of more than " eighty bonds of desistance taken between 1659 and " 1701, by parties who attempted to violate their privi- " leges; and that not only where the parties practised " in the city of Glasgow, but in every other district to " which the grant extends. At least fifteen of these " bonds are from individuals practising in the county " of Ayr, to which a doubt is now expressed whether " their privileges ever did extend. Where bonds " of desistance were not granted extrajudicially, the " faculty cited the offenders before their own court, " and pronounced decrees against them, upon which " diligence by horning and caption was raised. A list " of seventeen of these decrees is produced between " 1725 and 1759, on most of which diligence appears " to have followed.

" The appellants attempt to get rid of all this evi-
" dence of possession by referring to a letter of dea-
" conry, which the surgeons and barbers obtained from
" the magistrates and town council of Glasgow in 1656,
" and they say that this proves the faculty not to have
" been a corporation before that year. It proves that they
" were not a burghal corporation, that is, they had not
" the privileges with regard to the government of the
" town and other rights which it was in the power of
" the magistrates and town council to confer. But the
" town council of Glasgow could not give the faculty a
" corporate jurisdiction over four counties, or warrant
" all the corporate acts which were performed within
" that extensive district at any period, and still less
" during a period of more than fifty years before the
" date of the letter of deaconry. It is insinuated that,
" with the exception of what appears in the minutes to
" have taken place in 1602, there is no evidence of the
" faculty acting as a corporation before the date of the
" letter of deaconry. But that is a mistake. It is
" proved that the faculty sued as a corporation in 1635,
" founding exclusively on King James's gift as their
" title, for the letter of deaconry had not then been
" granted; and in that action they obtained a decree
" against all persons within their district practising
" surgery or medicine contrary to the terms of the
" grant, and against all judges and magistrates within
" these bounds to concur in enforcing the grant; and
" upon this decree general letters of horning were
" raised at the instance of the faculty. If there was
" not another document in process, we are of opinion
" that these signet letters would be decisive with regard
' to the point of possession. But there is a great mass

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" of proof to the same effect, particularly with regard " to corporate acts performed after the letters of dea- " conry were resigned.

" In addition to the title which the respondents have " produced, and the continuous possession satisfactorily " shown to have followed upon it, the question now " under consideration has been repeatedly decided in " this Court; and that not only in cases where the " rights of the faculty were indirectly recognized, but " where the point was distinctly raised and brought " before the Court for judgment. It was tried and " decided in an action of declarator raised by the " faculty in 1691, in which the summons libels upon " the gift of James VI., and concludes that the privi- " leges granted by it shall be declared. It was again " tried and decided in the suspension at the instance of " Calder v. Wallace in 1761, in which almost all the " arguments now advanced against the title of the " faculty were resorted to. And these were not unde- " fended cases, but judgment was pronounced in foro " contentioso. A series of cases followed, in which the " rights of the faculty thus established were judicially " recognized. So clear was the point considered, that " even the appellants themselves did not venture to stir " in the Court below previous to the present appeal. " We do not think that they were in consequence pre- " cluded from recurring to it in the House of Lords, " but we are of opinion that the decisions to which we " have referred are to be held as precedents settling the " law upon the point.

" With regard to what fell from Lord Gifford, in " the case of the Writers to the Signet v. Graham[1], it is

[1] 1 W. & S. 538.

" enough to say, that his Lordship did not decide the " question, whether the writers to the signet are a cor- " poration or not. He held that he had not materials " before him for that purpose. His judgment went on " a separate ground altogether, namely, that, whether " they were a corporation or not, they had not been sued " in that character, and therefore that their action could " not be supported. Whether Mr. Erskine was wrong " in laying it down as established law in his time that " the writers to the signet are a corporation, (for that is " necessarily implied in his observations on the College " of Justice,) remains yet to be tried.

' The only other point which we are directed to con- " sider by the remit is, ' whether the right of interdict " ' is taken away by the provision of a penalty made in " ' the grant or letter of gift mentioned in the plead- " ' ings?' We are clearly of opinion, that the right " of interdict is not taken away. When a penalty is " imposed to enforce an obligation, no option is given " to the party against whom it is directed to get quit " of his obligation by paying the penalty. In the lan- " guage of the law of Scotland the penalty is by and " attour performance. It is one mode of enforcing the " obligation added to every other mode which would " otherwise have been competent This is so clearly " proved by the authorities cited in the respondents " case, that we think it unnecessary to enlarge upon " the subject."

The following addition was made by *Lord Moncreiff*: —" Although retaining the opinion, or the doubt at " least, formerly expressed by me on the general merits " of this case, I entirely concur in this opinion on " the points embraced by it."

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Judgment of Court, 7th March 1837.

On the case being advised by the Judges of the Second Division, the following unanimous interlocutor was pronounced on the 7th (signed 9th) March 1837:—"The Lords having resumed consideration of the "cause, with the opinions of the consulted Judges, "find, that the respondents in the appeal, as the "Faculty of Physicians and Surgeons of Glasgow, are a "corporation capable in law of possessing and in fact "clothed with the rights for which they contend in this "action; and that the right of interdict is not thrown "away by the provision of or penalty made in the "grant or letter of gift in the pleadings mentioned, "and decern and declare accordingly; and adhere, and "confirm the interlocutors of Court dated 12th and "signed 15th November 1834, and 23d January 1835: "Find the Surgeons and the University conjointly liable "in the expenses incurred in the House of Lords, and "also in the expenses incurred in this Court since the "date of the remit by that House."

Against that interlocutor the University of Glasgow appealed.

Appellants Argument.

Appellants.—The opinions of the consulted judges have proceeded in some degree from a slight misconception of the nature of the question before them; and perhaps in a still greater degree from an undue and ill-founded impression, that, from the nature of the remit, this House intended to apply the principles of English law to the decision of a Scotch case, and have laid down principles of law with regard to corporations, which have been applied for the first time to the present question, and are at variance with constitutional as well

as with corporation law. There is no difference in the principle of the English and the Scotch corporation law; but the judges below have failed in the proper application of it. Words of incorporation, though usual, are not necessary, but there must be some words indicating a perpetuity. This House desired to know whether or not the King possessed the power of creating a corporation; and in answer to this question no reason, principle, or authority is given; and the learned Judges seem to have satisfied themselves with the fact, that these bodies have been created, and continued to style themselves corporations, without going into any inquiry as to the principle.

They assume that the prerogative of the Crown was sufficient to grant a corporation, and that because by the constitutional law of Scotland the King could create a corporation, and invest it with the powers claimed by the letter of 1599, they are entitled at once to arrive at the conclusion, that a corporation was created by the letter of gift of 1599, and that the parties claiming under it are vested with the privileges which they now seek to enforce. On the other hand it is maintained that no corporation was created, and that the intention of the letter of gift, however it may have been abused, was merely to bestow certain personal privileges of examination upon particular individuals, and those who might fill the situations held by them, if such privileges could legally be bestowed upon individuals in succession.

The letter of gift of 1599 specially excluded the right of the visitors, and their successors, to interfere with those individuals practising medicine who possessed the diploma or "testimonial" of a university where medicine is taught, as is proved by the narrative of the letter; which shows that the intention of King James the Sixth

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in granting it was to prevent "ignorant, unskillit" and uneducated persons from practising as surgeons, and negatives any intention to interfere with the rights of the universities, or to throw discredit upon the education received there, and the testimonials or degrees which they might grant. The testimonial of a university is declared to be sufficient to exclude any power of examination or interference on the part of the visitors; and the only question is, whether this exclusion is limited to the peculiar degree of doctor of physic, as separated from surgery, or whether it applies to the whole art of medicine? The Court below appear to look upon surgery as something apart and separate from medicine, and hold that the testimonial or degree of a university does not apply to it; but there is no ground for this distinction. It is quite true that physicians and surgeons turn their attention to different branches of the healing art; but they are both comprehended under the general term of medicine. The definition of surgery is thus given[1]:—"The term surgery has been usually em-
"ployed to signify that part of medicine which treats
"of the diseases of the human body which are to be
"cured or alleviated by the hand, by instruments, or
"external applications." And in the case of Steele[2] the Lord Justice Clerk treats surgery as a branch of medicine: he says, "I know that in very many parts of
"the kingdom the distinction between physicians and
"surgeons is by no means defined. Nothing is more
"common than for a person to exercise both profes-
"sions, and to practise the one is not considered an
"encroachment on the other. The distinction is much
"too fine. That accurate chemist Dr. Thomson says,

[1] Encyc. Brit., voce "Surgery."

[2] See post, p. 419.

" that physic and surgery are the two departments of " medicine. It is impossible to draw a distinction." If, therefore, surgery is to be considered a part of medicine, and omne majus continet in se minus, a party having a testimonial from a university of skill in surgery is necessarily exempted from all interference on the part of the respondents. And as the University of Glasgow possessed the power of granting testimonials in surgery, giving the privilege of practising surgery, that right cannot be abridged or destroyed by the letter of 1599.[1]

The Court of Session has found the appellants liable in the costs of the previous discussion in this House, under the erroneous impression that it was the intention of this House that these costs should be given if the point remitted was decided by them unfavourably to the appellants.[2]

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[1] 1 Kyd, Inc., pp. 13, 14; 1 Blackstone, pp. 467, 472–474; Conservators of the River Tone v. Ash, 10 Barn. & C. 349; Writers to the Signet v. Graham, on appeal, 1 Wils. & S. 538; Steele, 26th Feb. 1819, not reported; Kam. Elucid., art. 7. p. 54; Maitland's Hist. of Edin. 294; Jamieson's Dict., " Craft."

[2] Opinions of Judges of Second Division as to costs of first appeal:—

Lord Glenlee.—" I cannot see how in common justice we can refuse " the pursuers expenses, as I see it stated in the defenders case that the " question was not properly tried before us formerly. At all times " expenses are the pœna temere litigantium. This is a case of temere " litigans, and expenses should certainly be given."

Lord Meadowbank.—" I am entirely of the same opinion."

Lord Medwyn.—" When a party does not sufficiently plead a point in " the original court, but only in a court of appeal, expenses ought clearly " to be given against him, especially if he be in the wrong. We for- " merly found expenses due in this case, and we are bound to find them " anew."

Lord Justice Clerk.—" I conceive that the power with regard to the " expenses of this discussion, inserted in the remit by the House of " Lords, was inserted in order to give us the power to award the " expenses, which otherwise, under a remit under such a clause, might " have been matter of doubt. I am clear we must find expenses due."—Rep. in Fac. Coll.

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Respondents Argument.

Respondents.—The unanimous opinion of the Court below affords a distinct explanation in regard to the peculiarities of Scottish law on the subject of corporations; and under the sanction of that opinion the respondents submit, that, even looking at the charter of 1599 by itself, and apart altogether from the explanatory possession which followed, it possesses all the necessary characteristics of a valid Scottish charter of incorporation. Whether it be drawn with that technical precision and fulness which the law of England would require, the respondents cannot say; but it sufficiently contains the requisites of a Scottish charter of incorporation; and it so contains them, that any judgment which would refuse effect to this charter would actually nullify the greater part of the charters on which corporate rights in Scotland at present subsist.

It forms no good objection to the validity of the charter, that no specific name is expressly set forth in it as that by which the corporation was to sue and be sued; for, by the law and practice of Scotland, this was not necessary, and so it is stated in the opinion of the Court below. Neither does it form any valid objection, that there are not in the charter "incorporating words," or words of technical style, declaring the body to be a corporation. By the law of Scotland it is enough, if, from the whole scope and purview of the deed, the intention to create a corporation be fairly gathered. It is enough if it appear, from the general terms and nature of the deed, of whom the corporation was intended by the founder to consist; and in the present case this was sufficiently done by the bare erection of the craft into a corporation. The provision for continuing the corporate body is clearly expressed, and

expressed in the usual and appropriate style of the period; and the very words of it point to futurity. The deeds of incorporation, on which most of the trading crafts of Scotland now rest their existence, contain nothing more than a general grant of corporate privileges, either to individuals then existing, or to the craft generally named, "and their successors of the said "craft," without any further provision for the perpetuation of the corporate body, other than what is implied in this general grant itself, from the very nature of the case.

And whilst, even considered by itself, the charter of 1599 is thus to be held a valid charter of incorporation, the respondents are further entitled to maintain that its character as such is at once proved and confirmed by the possession which followed on it, affording both a contemporaneous exposition and a subsequent ratification of more than 200 years. The possession shown to exist is traced, with a distinctness very rarely to be found, back to the year 1602; according to the consulted Judges: — "Few cases have occurred, if indeed "any one, in which the possession of corporation pri- "vileges for nearly two centuries and a half has been "proved by such overwhelming evidence."

The respondents are therefore, under the charter 1599, and the possession following thereon, a lawful corporation, possessing the privilege of examining and licensing all persons desirous of practising surgery within the bounds specified in the charter, and of excluding all persons who have not been so examined and licensed from the practice of surgery within these bounds.

It cannot be successfully maintained that the holders

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of the degree of master in surgery, instituted by Glasgow College, are exempted from the operation of the charter held by the faculty, which is of the most ample and unlimited description, requiring all who are desirous of practising surgery within the bounds therein specified to be examined and licensed by the faculty.

In opposition to the terms of the charter, the appellants maintain that an exception lies in favour of certain persons from the general rule thus laid down. It is therefore incumbent on them to make good this exception clearly and unequivocally; and this they attempt to do by endeavouring to establish for those holding the degrees of universities, and amongst others of the university of Glasgow, an inherent privilege of practising every where the art in which the degrees are granted, without the party being subjected to interruption or interference from any quarter whatsoever: and as they claim no higher regulæ for the university of Glasgow than belong to other universities, the position of the appellants must be considered to go to this, that whenever a science or art is taught in any university, and a degree in that science or art is granted by the university, the effect of that degree is to enable the holder of it to practise that science or art every where, without its being in the power of any individual or any body of individuals to interfere to prevent him. This, however, is a position submitted to be untenable.

The respondents are entitled to have their rights enforced, by obtaining an interdict against those individuals who practise surgery without being examined and licensed by the faculty. No principle in the law of Scotland is more clearly settled, — and so it has been laid down by the consulted judges,—than that the provi-

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sion of a penalty for the breach of any obligation in no way extinguishes the right to apply to the courts of law for the ordinary preventive remedies against the breach of obligation, and amongst others that of interdict, which is, of all remedies, the most common and direct. There is much sound expediency in the establishment of this principle; for, however proper the penal remedy may be as a punishment for past transgressions, it seems only consistent with equity that, in a matter of civil right future transgressions should be checked by the bar of the preventive remedy. In the case of a body like the faculty, the mere exaction of a penalty like that in question would be utterly ineffective to accomplish the ends of the law.[1]

Ld. Chancellor's Speech.

The LORD CHANCELLOR.—My Lords, the question in this case was, whether persons holding a degree in the College of Glasgow,—the degree of master in surgery,—are entitled to practise within the bounds of the charter of incorporation granted to the surgeons of Glasgow, without being examined and licensed by the faculty of Glasgow.

My Lords, it appears that the University of Glasgow have recently granted degrees in surgery. They have

[1] *Respondents Authorities.* — College of Physicians v. Levett, 1 Lord Raymond, 472; College of Physicians v. West, 10 Mod. Rep. 353; 1 Kyd, 62–69, 226–254, and 2 Kyd, 50; Surgeons of Glasgow v. Magistrates of Glasgow, 7th July 1694, 1 Fount. 633; App., p. 54, of printed papers; Surgeons of Glasgow v. Calder, 1761, ibid. p. 64; Surgeons of Glasgow v. Dunlop, 1791, ibid. p. 77; Surgeons of Glasgow v. Magistrates of Glasgow, 1791, ibid. p. 74; Magistrates of Glasgow v. Steele, 26th February 1819, ibid. p. 82; Skirring v. Smellie, 17th Jan. 1803; Fac. Coll. xiii. 170; No. 76, Mor. 10921; Fleshers of Canongate v. Wight, 11th Dec. 1835, 14 D., B., & M., p. 135; Blankley v. Winstanley, 3 T. R., p. 279; Magistrates of Dunbar v. The Heritors, 11 S., D., & B., p. 879; 1 Sh. & M'L., p. 134, reversed.

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been in the habit of granting degrees in physic or medicine, but till recently they have not granted degrees expressly in the science of surgery.

The title of the corporation which claims a right of licensing persons to practise surgery within certain limits, rests upon a charter or letter of gift of James the Sixth, of date the 29th of November 1599; by which he granted to two persons, described as "professors of "medicine," and their successors, indwellers of the city of Glasgow, certain powers for the purpose of regulating the practice of surgery and medicine. It turns upon the expressions used in that letter, and on what has taken place since that letter, whether the right in question belongs to this corporation. They were by that letter empowered to call before them "all persons pro- "fessing or using the art of surgery within the bounds "specified, to examine them upon their literature, "knowledge, and practice, and, if found worthy, to allow "and approve them, give them testimonials, and autho- "rize them to practise." They also were authorized to appoint visitors to inspect the bodies of those who might be hurt or murdered, and to make statutes as to the practice of the art; and by the fourth clause it was provided, that no person should exercise medicine within the bounds of the charter without the testimonial of a famous university where medicine was taught, or a licence from the King's or Queen's physician; and the visitors appointed were empowered to interdict transgressors under certain penalties.

My Lords, it was very much matter of discussion whether this authorized the corporation to exercise jurisdiction over surgery, it being contended that it was included in and formed part of the science of medicine.

It appears, however, that the distinction between the two is very carefully guarded in this letter or charter, because it makes this distinction between them: that persons shall not practise surgery without a licence from the corporation, but persons who practise medicine may practise it, provided they have a degree of a famous university where medicine is taught, or the testimonial of the king's or queen's physician.

My Lords, it does not rest upon that charter, although that is the foundation of the claim of this corporation, for it appears that by the Scotch act of 1672 that charter was confirmed. The enactment was, that it should be confirmed after the form and tenor thereof in all points, in so far as the same gift and the ratification thereof could be extended in favour of the surgeons, apothecaries, and barbers within the said burgh of Glasgow, and their successors, and no further; and his Majesty and estates of parliament declared, that the general ratification should be as valid and sufficient as if the gift were word for word engrossed, notwithstanding the same be not so done.

My Lords, it does not rest upon that ratification of that act, for in 1691, upon a question arising as to the constitution of this corporation and the extent of their rights and privileges, those rights and privileges were declared by the Court of Session by a declarator of that date[1] in these terms:—"The Lords of Council and "Session has found and hereby finds and declares the "said chirurgeons of Glasgow their privileges in terms "of the foresaid gift and ratification, and possessione of "debarring unfreemen lybelled, and particularlie that

[1] Surgeons of Glasgow v. Magistrates, 1691. See App., p. 54, printed Session Papers in this cause.

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"the visitors of the chirurgeons at the time of the said "gift, and their successors ever since and in all time "coming, had and have right to make rules and statutes "anent the dispensing of the said airt, and to ordour "the manner of the election of their successors, and also "to make rules anent the admission of fit and qualified "persons for the practice of the said airt and trade, "and to debar all others from the exercise of yrof "who are not duly admitted conform to the said rules; "and particularlie to debar all such as have not served "their apprentisship in the town of Glasgow, or have "not married the daughter of one freeman of the said "incorporation, and also tryed and found qualified; "and to fine all unfreemen exercising the same in the "soume of fortie pounds Scots toties quoties."

My Lords, I will not occupy your Lordships time in stating the various suits which since that period have been brought into the Court of Session, further than to state the names of the causes and the years in which they took place; for it does appear that there have been various instances not only of the constant and repeated exercise of the privilege which is claimed by this corporation, but several suits at different periods in the Court of Session in which the right has been acted upon and established. In 1761 there was that which is called the Calder case [1], in which the right was claimed directly; in 1791, in the case between the Faculty and Alexander Dunlop [1]; and in 1819 another case [1], which goes so directly to the point that I will state what was the interlocutor then pronounced. It was an action at the instance of Dr. John Balmanno, president of the faculty

1 Ante, p. 423.

of physicians and surgeons of Glasgow, and Moses Gardiner, Esquire, their visitor, for themselves and in the name of the remanent members of the said faculty. There were several points found and established by that interlocutor: first, "That the titles produced by the "pursuers, as explained and confirmed by the acts of "possession condescended on by them, afford a suffi- "cient title to carry on such an action as the present. "That in virtue of the diplomas and other memorials "produced by the defenders and other persons named, "these parties are authorized without challenge to "practise medicine within the districts specified in the "royal grants founded on by the pursuers." That applies to medicine as distinguished from surgery, "that "no persons can within the said district practise sur- "gery or carry on the business of an apothecary or "druggist without such an examination as is there "described, that the defender has been properly pro- "hibited from carrying on the profession of medicine "and surgery, or that of an apothecary, as not being "sufficiently qualified; and decerns and declares ac- "cordingly."

Now, my Lords, that being the state of the decisions, the present contest arose, and when it came before the Second Division of the Court of Session the other Judges were consulted, and six of the learned Judges stated their opinion to be in favour of the rights of this corporation; they joined in the same judgment; one other Judge, Lord Medwyn, concurred in opinion, but he made a separate note, explaining the grounds on which he proceeded. There is certainly the high authority of Lord Moncreiff, who did not differ as to the title

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of the corporation; but the doubt he entertained was not as to the effect of the grant from the Crown, and not as to whether this body was a corporation or not,—but his doubt arose from the contest between what he supposed to be the right of the College of Glasgow and this corporation. He considered that the College of Glasgow, being of more ancient date and having the power to grant degrees, a grant from the Crown, though confirmed by parliament, ought not to interfere with their privileges.

My Lords, it appears that the University of Glasgow, though they have been in the constant habit of granting degrees in medicine, have not been in the habit of granting degrees in surgery, so that during the whole period that these two bodies have been acting together, one has been granting degrees in medicine, which is excepted from the grant made to this corporation, inasmuch as those who practise medicine are only called upon to obtain the licence either of the king's or queen's physician, or a degree of some famous university where medicine was taught; but with reference to surgery, there was given to that corporation by that grant the exclusive privilege, and they seem to have exercised the exclusive privilege from the period of that grant till the period when this contest arose, supported by the various decisions to which I have before referred. If, therefore, there had been any conflict of authority between these two bodies, the length of time during which the one had exercised the power and the other had abstained from exercising it would be quite sufficient to enable your Lordships to come to the conclusion as to which of the two bodies ought to be permitted to exercise the right;

and that was the opinion of the great majority of the Judges, — in short, of all the Judges except Lord Moncreiff.

My Lords, when this case came before your Lordships House in the year 1835, my noble and learned friend (Lord Brougham) was in the House, and the discussion of the case ended in a remit for the purpose of ascertaining two points, and two points only; namely, first, whether this body claiming to be a corporation was a legal corporation, and secondly, whether, as they had a power of imposing a penalty, the power to impose a penalty superseded any right they would otherwise have of applying to the Court of Session for an interdict against parties practising. My Lords, that remit being made to the Court of Session has produced, certainly, very learned opinions from the Judges to whom that question was referred. They have gone at a very great length and with very great learning into the history of this corporation, and the result is, that they have stated an unanimous opinion, that this is a legal corporation according to the law of Scotland, and that, the corporation having the power to raise a penalty of 40*l.* Scots, it did not debar them from the right of applying for the protection of their privileges by reference to the Court of Session.

My Lords, my noble and learned friend will be able to state, (for the remit from this House does not specify, and from any information we have it does not appear,) to what extent the opinion of the House was formed on the other parts of the case. One may, however, assume that the difficulty of the case was limited to those two points on which it was sent back to the Court of Session. If that is so, the opinion of the House has been formerly expressed on the other points,

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in which opinion I entirely concur; though, independently of that which raised the question, there can be no doubt that if this corporation had always exercised this right, granted originally by a charter from the Crown under terms which are open to some observation, but which was afterwards confirmed by parliament,—if the right was exercised from that time to the present, and it was declared by a declarator of the Court of Session so early as 1642 that they were entitled to the privileges which they claim,—if also the right was asserted at several different periods and always with success, your Lordships would, I think, feel no difficulty in coming to the conclusion that that evidence was quite sufficient to establish the right which they now claim. And although, my Lords, there are, no doubt, peculiarities in this corporation to the eye of an English lawyer, and observations might be made which would be very strong if we were considering an English corporation, and not a Scotch corporation, yet we have now the deliberate opinion of the learned Judges on that which is purely a question of Scotch law, and all the learned Judges agree in that opinion. They go through the objections which are made to this corporation, and they state instances in which the same objections might equally have been urged against other Scotch corporations, but which were not held to invalidate the establishment of those Scotch corporations. Your Lordships have now, therefore, the highest possible authority for the opinion that this corporation is one which is free from the objections which were suggested against it when the case was last at your Lordships bar; you have the opinion of the learned Judges that this is a corporation which is, according to the law of Scotland, entitled to the privileges which the

Crown intended to confer upon it; and all the important parts of the case being now brought under your Lordships view, I apprehend that you will have no difficulty in affirming the interlocutor which is the subject of appeal.

Lord Brougham.—My Lords, my noble and learned friend has justly stated the grounds upon which the remit was made to the Court below. The doubts which had presented themselves to my mind were shared by a noble and learned friend of mine, not now present, the highest authority upon a question of that sort, inasmuch as he is at the head of that Court which is the visitor of all corporations in this country,—I mean the Lord Chief Justice of the Court of Queen's Bench; and it is the more necessary that I should state this, because by some extraordinary omission in the report of the case, otherwise a very accurate report, in Shaw and M'Lean, I do not see any mention made of the presence of the Lord Chief Justice. By some accident that important circumstance is omitted. Now, the doubts which presented themselves to my mind were as fully shared by my noble and learned friend the Lord Chief Justice, as indeed they must have been by every person, (as my noble and learned friend has just stated,) who viewed this with the eye of an English lawyer.

My Lords, my noble and learned friend, not now present, felt another difficulty, which I think is now also removed by the statements which have been made by the learned Judges of the Court below, relating to the power of making bye laws. In that I entirely shared. Those bye laws, as they are called, do not at all answer the description of bye laws in this country.

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The power of making bye laws is of a very general nature, not merely intra the corpus of the corporation, which is in the nature of bye laws, but having an effect over the whole of the subjects of the King in Scotland; this we should think the very reverse of a bye law, instead of being a bye law. However, it does appear, by the cases quoted and the precedents referred to by the learned Judges, that some such power as this has been enjoyed by other corporations; not indeed that much turns in this case upon that, for they do not appear to have exercised that power.

Another doubt entertained by the Lord Chief Justice was as to the power of the Crown to grant such an exclusive charter, but the manner in which the defect of the original charter has been cured by the statute of 1642 is to be taken into account. I have not had any opportunity of communicating with the Lord Chief Justice upon this subject; if he had an opportunity of perusing the opinions given and the precedents quoted by the learned Judges below, I have not the least doubt that his difficulty would have been got over.

Upon the whole, my Lords, I am of opinion, with my noble and learned friend, that nothing now remains for your Lordships but to affirm this decision. Some difficulty appears to have occurred below upon the questions of costs. The power exercised by the Court below of giving the costs of the appeal may be an extraordinary one, but my impression is that it was with the view, if possible, of preventing the coming here again that that power was given; but be that as it may, I do not think the Court below have at all exceeded the power conferred upon them by that part of the order.

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Judgment.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL—ARCHIBALD GRAHAME, Solicitors.

[11*th August* 1840.]

(No. 19.) BENJAMIN ABERNETHIE, Appellant.[1]

[*Knight Bruce — Macdowall.*]

Lieutenant General BENJAMIN FORBES or GORDON, Respondent.

[*Attorney General (Campbell) — Lord Advocate (Rutherfurd).*]

Tailzie — Irritancy — Investiture. — A. died, leaving a strict entail of his estate, in the form of a procuratory of resignation, unexecuted, in favour of himself, and after his decease, B., and the heirs male of his body; whom failing, C., and the heirs male of his body; whom failing, other substitutes. B. resigned upon the procuratory, and obtained a Crown charter, and took infeftment, but without having served. Some time after (the entail being recorded) B. brought a reduction, in which he obtained a reduction, in absence, of the deed of entail, upon the ground of defective execution, and a reduction of the titles made up as struck at by the Act 1693. c. 35. B. then served in fee simple, obtained a charter, and was infeft. Several years afterwards C. brought a reduction of the decree, and of the titles originally made up under the entail de novo, and of the fee-simple title, coupled with a declarator of the validity and of contravention, and obtained decree in terms of the prior conclusions of the libel, the remaining conclusions being superseded. Meantime B. executed the original procuratory de novo, obtained a charter in terms of the entail, and was infeft. — Held (affirming the judgment of the Court of Session), 1, that the title so made up under the entail was a complete feudal title; 2, that the mere possessing of the estate on

[1] Fac. Coll., 20th June 1837.

this title was not sufficient purgation; but, 3, that on the defender undertaking to find the most ample caution that no debts or deeds of his during his fee-simple possession should affect the estate directly or indirectly, there being no allegation made that any such debts or deeds existed, he was entitled to be assoilzied in hoc statu from the conclusions of forfeiture, and quoad ultra to have the action dismissed.

1st Division.

Lord Ordinary Cockburn.

Statement.

THE late General Gordon, in July 1803, executed a deed of entail of his estate of Balbithan, whereby he called himself as institute, and after his decease the defender, under burden of certain life-rents, and the heirs male of his body; whom failing, the pursuer and the heirs male of his body; whom failing, the pursuer's brother, and the heirs male of his body; whom failing, Sir John Gordon, captain and lieutenant of the Coldstream regiment of Guards, and the heirs male of his body; whom failing, any heirs to be afterwards named; and failing any such nomination, his own nearest heirs whomsoever, and their assignees. There was no nomination, and the name of the last-named substitute had been inserted in a blank after the deed was executed.

The deed contained all the clauses of a strict entail; in particular express provisions by which the heirs were prohibited from possessing the estate under any title different and distinct from the entail; and enjoining that the conditions should be inserted in the after conveyances and infeftments; and likewise declaring that the heirs should use the surname of Gordon allenarly, and the arms and designation of Gordon of Balbithan, all under pain of forfeiture of their right to the next heir; it being declared that the contraveners should ipso facto lose and forfeit their right to the said lands and

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estates, and that the same should devolve to the next heir of entail in like manner as if the contravener were naturally dead, and that free and disburdened of all the debts and deeds of such contravener, and of all adjudications and other diligences deduced thereon.

There was likewise a special clause, declaring that the heir in possession should be bound to redeem any adjudications or other legal diligences, "for payment of "debts which shall be owing by me at my death, or for "payment of any other real or legal burdens, or for "any other debts to which my said lands and others "may be subjected at any time hereafter," within the five years after the date of such adjudications, and to disburden the lands and estate thereof in all time to come; and in case of their failing to redeem as aforesaid, they were to forfeit their right, which was to devolve upon the next heir.

In November 1803 General Gordon died, when the succession under the entail opened to the defender as fiar, subject to a life-rent in favour of his father.

In 1804 the entail was recorded by the defender.

In 1814 a charter of resignation under the great seal, in virtue of the unexecuted procuratory in the entail, but without the procuratory being taken up by service, was expede, in favour of the defender's father in life-rent and himself in fee, of the lands contained in the entail, and under the conditions, provisions, and whole clauses thereof; and in January 1815 infeftment containing these provisions, &c. was taken thereon, and recorded. On this title the defender possessed, under all the conditions of the entail, until 1822.

He then served himself nearest heir of line to the entailer, and, relinquishing the name of Gordon, raised

a reduction of the entail and of the title made up under it in 1814; and on a proof obtained decree, in the absence of the pursuer, reducing in terms of the libel.

He then obtained a precept from chancery, and took an infeftment in fee simple, which was recorded 25th November 1822.

The pursuer, who was then abroad, on his return to this country in 1833, raised the present reduction reductive of the above decree. The action, besides the reductive conclusions, concluded for declarator that the entail was valid and subsisting; and farther, that it should be found and declared, "that the defender has "committed a contravention of the said entail, and "violation of the conditions, limitations, and restric- "tions therein contained, whereby he has incurred an "irritancy of and amitted, lost, and forfeited his right, "title, and interest to the whole entailed lands and "others specified in the said deed of entail, and that "his right, title, and interest therein is now and shall "in all time coming be void and extinct; and that the "said lands and others, with the rents, maills, and duties "of the same, have fallen, devolved, and accresced and "do now belong to the pursuer, the said Benjamin "Abernethie, as the next heir appointed to succeed by "the said deed of entail, in the same manner, and as "fully and freely, in every respect, as if the said de- "fender had never been in the possession of the said "estate, or had never been called to the succession "under and by virtue of the said deed of entail, or as "if he were naturally dead; and farther, it ought and "should be found and declared that the said Benjamin "Abernethie, the pursuer, has now right to make up "and complete titles in his own person to the foresaid

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"entailed estate, in terms of the foresaid deed of entail; "or, at least, the said defender ought and should be "decerned and ordained to make up titles in a proper, "legal, and habile form to the said entailed estate, and "to possess the same under the whole conditions, pro- "visions, limitations, and clauses irritant and resolutive, "contained in the said deed of entail, and by no title "whatever which is in any respect disconform to or "inconsistent with the said deed of entail."

Defences were given in, and a record closed on the summons and defences, without any averment being made that the defender during his possession under his fee simple title had contracted any debt or granted any deed which could affect the estate.

The Court, 17th January 1835, reduced the decreet of reduction libelled on, and likewise the title made up on the procuratory in the entail in 1814, and found and declared the entail to be valid and subsisting.[1]

The case having come back to the Lord Ordinary to have the question discussed, whether or not the defender had subjected himself to the further conclusions of the libel, the defender gave in a minute, (2d February 1835,) stating that he had resumed the name, arms, and designation of Gordon of Balbithan, and was served heir of tailzie and provision to the entailer in terms of the entail of 1803, an extract of the retour from chancery being therewith produced.

In June 1835, the defender obtained a Crown charter of resignation, proceeding on the procuratory in the entail, and expede an infeftment thereon, in which were engrossed all the fetters and conditions of the entail.

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[1] Fac. Coll. x. 156.

The defender then maintained that the irritancy was thus purged, or at least could be purged by such farther steps as should be thought necessary before decreet.

Meantime the defender, by permission of the Court, lodged a minute, stating "that with a view to meet the "ground on which decree of forfeiture of the estate "was sought for against the defender, in respect of "the risk to which the estate is said to have been "exposed during the time the titles were made up in "fee simple, in case the defender had then contracted "debts, that is, prior to the 9th day of June 1835, "being the date of recording the sasine proceeding on "the Crown charter expede on the procuratory con-"tained in the disposition and deed of entail of the said "estate of Balbithan, he, the said defender, distinctly "averring that there were no debts in existence prior "to the period above mentioned, is ready and willing "to find the most ample and sufficient caution and "security, to the effect that he had contracted and "now owes no debts whatever incurred before the said "9th day of June 1835, and that no debts contracted "by him prior to the period before mentioned should "ever be made available against the said estate of Bal-"bithan; and, of course, that all such debts, and all "adjudications or diligences which might be led there-"for, should be redeemed within five years from the "date of such adjudications, and the said estate of "Balbithan disburdened of the same, in terms of the "condition to that effect contained in the original deed "of entail, or within such other time as the Court may "be pleased to appoint."

"*N. B.*—The defender has thought it right to in-

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"clude in his offer the condition of the caution being "extended to the securing of the estate from debt; but "he is anxious that it should be understood, that he "specially intends that caution shall also be directly "and expressly found to the effect that he contracted "and owes no debts whatever of any kind prior to the "date mentioned in the said minute."

The Lord Ordinary found, that the defender's offer to purge any irritancy that may have been incurred may be regularly entertained, though not stated in the original record; and received the minute as an offer of purgation, and ordered cases upon the question of irritancy and forfeiture, and reported the cause to the Court, who appointed a hearing.

It appeared that at the time the first action of reduction was brought the appellant, who was unmarried, was in South America, his brother, the next substitute, dead without male issue, and that Sir John Gordon, who was also unmarried, was in India; and it was alleged by the appellant that an undue advantage had been taken of this coincidence, and that no attempt had been made to intimate the action. It further appeared, in regard to one of the grounds on which the original decree was rested, (viz. that the deed bore a false date,) that the party who drew the entail, and was also the agent of the respondent, was examined as a witness in support of this allegation; and that, although he was in possession of a letter from the maker of the entail, stating the deed of entail was executed of the date it bore, and instructing him to fill up the testing clause with the necessary particulars, which were accordingly inserted, this letter was not produced. It was alleged by the appellant that this was an act of concealment, and coupled with the above

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circumstances, was an indication of fraud sufficient to invalidate the decree, particularly as the suit was conducted ex parte.

After hearing counsel, the Lords of the First Division pronounced the following judgment: — "(20th June "1837). The Lords, having resumed consideration of "the revised cases, the printed minute for the defender, "and whole cause, and having heard counsel for the "parties, find, that, in respect the defender has made "up and possesses under a feudal title to the estate of "Balbithan completed in terms of the deed of entail, "and has offered, as the aforesaid minute bears, to find "the most ample and sufficient caution and security "that, prior to the period of completing the said title, "there neither were debts nor deeds contracted or "executed by him which could in any way, directly or "indirectly, affect the said estate as settled by the "entail; and that no debts or deed which may have "been contracted, made, or granted prior to the fore-"said period should ever be made available against "said estate, as so settled; they therefore in hoc statu "assoilzie the defender from the conclusion of for-"feiture, and quoad ultra dismiss the action, and "decern: farther, that the defender or his cautioners "shall have right at any time to show, by declarator or "other competent process, that the necessity for the "continuance of such caution no longer exists: find "the pursuer entitled to expenses, subject to modifi-"cation; appoint an account thereof to be lodged, and "remit the same to the auditor to be taxed and "reported."

The pursuer appealed.

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Appellant's Argument.

Appellant. — The statute 1685, c. 22., specially provides for the precise event which has occurred in the present case by a positive enactment, which expressly declares, that if the provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall bruik or enjoy the tailzied estate, the said estate shall ipso facto fall, accresce, and be devolved to the next heir of tailzie.

The enactment in that part of the statute which authorizes entailers to insert irritant and resolutive clauses in deeds of entail is entirely distinct and separate, and differs in toto from the enactment in that part of the statute which provides for the repetition of the said irritant and resolutive clauses by the respective heirs of entail in the rights and conveyances in their favour, following upon the original deed of entail. The foresaid enactments in the said statute differ from each other in particular as well in form and construction as in effect and operation. In the case of contravention of the irritant and resolutive clauses in a deed of entail, the next heir of tailzie is authorized and directed to take advantage thereof by applying to the Court, in the form of an action to annul or avoid a right acquired by or created in favour of some third party dealing or contracting with or receiving the said right from the heir in possession, according to the ordinary effect and operation of irritant clauses in deeds or contracts; and the resolution of the right of the heir of entail so contravening is made to depend on the previous avoidance of the right acquired in contravention of the irritant clauses. Whereas, in the case of an heir of entail acting contrary to the terms of the statute, by bruiking or enjoying the tailzied estate and not repeat-

ing the provisions and irritant clauses of the entail in the rights and conveyances whereby he so bruiks and enjoys the tailzied estate, the said estate passes ipso facto to the next heir, by force of the clause of devolution contained in the statute.[1]

It has been said the statute should have been expressly libelled on. Why? The statute is the law of the land. Is it because the statute is penal? The statute is in no respect penal; on the contrary, as regards creditors (to protect whom was its principal, if not only object,) it is remedial, and as regards the powers of entailers over their donees it merely affirms the common law. Besides, it is not pretended that the statute is libelled on where a breach is committed; and moreover one of the learned Judges states his opinion that the objection was not fatal, but admitted of amendment if necessary.[2] The respondent has waived the objection by not making it in limine of the action.

Clauses of resolution or devolution have been long known, and had effect given to them by the law of Scotland.[3] So completely have these clauses been recognized in the law of Scotland, that in the well-known case of Stormonth[4] in 1662, it was actually held by the Court that a party might place his property extra commercium by the sole operation of these clauses. In 1685 the legislature interfered, and while it was deemed expedient that the lieges should still have the power of placing their estates extra commercium, it was ordained

[1] Lord Chancellor in Stewart v. Fullerton, 4 Wilson & Shaw, p. 211.

[2] Lord Corehouse, Fac. Coll. 1836–7, p. 1085.

[3] Simpson v. Home, Mor. 15,353; Lockhart v. Gilmour, Mor. 15,404; Bruce Henderson v. Henderson, Mor. 4215, 15,439; Kempt v. Watt, Mor. 15,528; Fleming v. Lord Elphinstone, Mor. 15,559; Lord Meadowbank in Bargeny Cause.

[4] Mor. 13,994.

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that in so far as this was their object it should be effectuated differently, that is to say, that they should for this purpose insert in their taillies irritant as well as resolutive clauses, which irritant clauses were previously known in the law of Scotland as clauses of forfeiture in contracts for value, and they operated on such contracts in this way,—that the party to the contract who wished to take advantage of a breach brought an action against the other, founded on this clause, to have the contract for value set aside, the contract remaining effectual till decree notwithstanding it might otherwise be declared in the contract itself. The statute accordingly provided that these clauses should be enforced against creditors, purchasers, and other third parties dealing with heirs of taillie, by an action of declarator, in the form of a rescissory action, to set aside the rights they had acquired, the operation of the devolving or resolution against the heir being suspended till decree was pronounced irritating or avoiding such rights, but immediately upon that event the resolutive clause had full force, so much so, that the statute simply says the next heir may serve. Hence the distinction so plainly pointed out by the statute. If there are irritant clauses inserted in the rights and conveyances whereby the heir of taillie enjoys the estate, dealings with such heir may be set aside by means of a declarator; if on the other hand such clauses are not so inserted, dealings with such heir cannot be set aside, neither can there be any suspension of the resolutive clause, but the estate does, thereby ipso facto devolve to the next heir.

It has been taken for granted, however, that the words of the statute do not authorize the distinction which is here contended for, although, so far as the

appellant has been able to discover, without reason assigned.

There is one expression in the statute which, though not adverted to on the other side, if taken alone, and construed as an entirely isolated sentence, might at first sight give an appearance of plausibility to this view of the statute. The statute says that the omission to insert the irritant clauses shall import a contravention of the irritant as well as of the resolutive clauses; but the statute does not stop there. It immediately goes on to explain what is meant and intended by this expression; and hence it is clear, that except by construing the statute so as to involve within itself a contradiction, the party contravening is not in the situation merely of a party who has committed an act which would authorize a declarator of irritancy, but precisely in the situation of the party against whom a contravention has been already established by decree.

To apply the doctrine of purgation then to a case such as the present, is to give relief against the express provision of the statute, which the established law of Scotland does not and cannot sanction or permit.[1] It has been said, however, by one of the learned Judges[2], that, in a recent case[3], the Court modified the statute. This it is conceived is a mistake. In that case the meaning of the statute appears to have been misunderstood. It was said that the statute meant to exclude the descendants of the body of the contravener, even though they should be the next heirs of entail, but does

[1] Lord President Blair, in Cameron, 12th Dec. 1810, Fac. Coll.; Lord Chancellor in Roxburghe entail cause, Dow's Reports, vol. ii. p. 208, 209.

[2] Fac. Coll. 1836–7, p. 1086.

[3] Bontine, 2d March 1837.

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not the statute expressly declare, in the words immediately following, that the next heir of entail is the party entitled to take advantage of the contravention? What the statute clearly meant was, to deprive the contravener of the estate of inheritance in fee simple which he had acquired, to cut off him and his heirs of line, as distinguished from the next heir of tailzie. If the next heir of tailzie happened to be the eldest son of the contravener, he would not at the time of the contravention be, in the words of the statute, his heir. The contravention is declared during the life-time of the contravener, and nemo est hæres viventis. The Court, therefore, in the case alluded to, instead of modifying, gave effect to the statute. The appellant is not prepared to deny that an entailer might in his deed provide that the statute should not come into operation to its fullest extent in regard to his entail, but that some other and distinct consequence should follow a contravention from that which the statute has provided for the particular case. To give effect, however, to such a provision would clearly not be to modify the statute.

In the present case it is not pretended that the corresponding provision in the entail is otherwise than in perfect consistency with the statute, and the appellant is entitled to found either upon the statute or upon the provision in the entail as confirmed by the statute. It is true that resolutive clauses, in so far as inconsistent with the statute, — that is, in so far as they provide an ipso facto devolution where the statute has provided otherwise, — cannot receive effect, but upon the same principle, and applicando singula singulis, where it is in accordance with the statute, it must receive effect. In questions inter hæredes intra familiam of the

substitute heirs[1], the irritant clauses do not come into operation; in a question such as the present, which is exclusively a question inter hæredes, the statute has in express words excluded their operation. What the appellant complains of is not, as insinuated, that the respondent has committed a contravention of the irritant clauses by committing an act of alienation which the appellant could by force of such clauses annul and set aside; what he complains of is, that the respondent has so placed the estate that if he should, during his possession, commit an act of alienation, the irritant clauses cannot operate to avoid it. He is not seeking to set aside the rights of onerous third parties; on the contrary, he founds upon their validity, and because of the possibility of the existence of such rights during the respondent's possession, he seeks only to establish the fact of the descent of the estate to the next heir.

It is no part of the appellant's case to deny that in leases, feus, and other onerous contracts where one party contractor seeks to set aside the contract for a breach, the other may, before the irritancy is established, prevent the operation of the irritant clause, by placing matters in such a situation that he may substantially meet the action of declarator by a denial of the act complained of. Neither is it in any degree essential to the case of the appellant that he should deny the application of a similar principle to a breach of the irritant clauses in entails. The distinction contended for by him remains untouched were he to admit this application. Let it therefore be assumed, for the sake of argument, that there is no distinction between irritant and resolutive clauses,

[1] Cases cited ut supra, p. 443, and Lord Brougham in Cathcart v. Cathcart, 5 W. & S. 315.

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— that a clause of devolution in a settlement is one and the same thing with an irritant clause in an onerous contract, — that the statutory clause which devolves the estate to the next heir in case of the non-insertion of irritant clauses, and which comes into operation only when all the irritant clauses in the entail are declared to be ineffectual, is itself one of these very irritant clauses, — let all this be assumed, and even then it is denied that the law, as hitherto administered, will admit of purgation in such a case as the present. The cases chiefly founded on by the respondent to show that purgation is competent in all cases of contravention of the irritant clauses in an entail, without exception, are Maclachlan[1] and Price of Raploch. In these cases, supposing them to have been cases of purgation, the party who had acquired the right as against the entail had not evicted the estate. The right could in each case be discharged by simple renunciation. It did not require a new conveyance from the alienee to revest the contravener. In the case of Maclachlan the question was simply whether the execution of a trust deed to try the title, without infeftment, was an irritancy, and it was found that it was not so. In the case of Price, chiefly if not solely relied upon by the respondent, the fee of the estate was adjudged, but not evicted. The adjudication might have been discharged by simple renunciation; there had been no declarator of expiry of the legal, no investiture in the person of the adjudger. Independently of these considerations the case of Price cannot be adduced as an authority. It is not reported; and why? Because, as observed by the Lord Justice

[1] Mor. 1542.

Clerk in the Queensberry cases[1], "there was collusion, "which must have had influence on that case; no fixed "rule was laid down in that case." The adjudication, as restricted to the liferent of the adjudger, was either altogether nugatory[2], or it was in itself a contravention. In the present case the estate is clearly evicted from the heirs of taillie by the heir of line; and but for the statutory clause of devolution it would be the inheritance in fee-simple of the respondent; and nothing but a conveyance by the heir of line to the heirs of taillie would place the estate again under fetters in their favour; the estate so fettered, however, would not be an entailed estate flowing from its own author, but a new and distinct entailed estate flowing from an heir of line, whom the original donor had constituted a substitute of entail. The case of Bargeny[3] was a case arising out of a breach of the irritant clauses in the entail of Bargeny, and not, as seems to have been imagined, out of a contravention of the clause of devolution in the North Berwick entail. A breach of the irritant clause in the Bargeny entail was alleged to have been committed with a view to escape the effect of the clause of devolution in the North Berwick entail. When the action of declarator of irritancy was brought, it appeared that matters were de facto precisely in the same situation as if there had been no repudiation, and therefore there was not, in point of fact, any irritancy; and besides, it was the opinion of the Court that Sir Hew could not commit an effectual contravention, he having been, in relation to

[1] Fac. Coll. fol. vol. xx. p. 172.

[2] Graham v. Hunter, 7 Shaw, p. 13; Lord Corehouse, in Bontine v. Graham, Fac. Coll., p. 674.

[3] 1 Wilson & Shaw's Appeal Cases, 410.

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the estate, merely in a state of apparency. The dicta of the Judges in that case, therefore, so far as relied on by the respondent, do not apply to the present; but that case, so far as it is an authority in the present case, is a most valuable one for the appellant, for in that case the late Lord Meadowbank, a very high authority, contrasts such a case as the present with the case which then occurred, and has most learnedly and accurately pointed out, and, as it appears to the appellant, incontestibly established, the distinctions for which he contends.[1]

The respondent has been able to refer to two cases only in which, according to his version of them, the doctrine of purgation is said to have been applied to clauses of devolution as distinguished from irritant clauses. These are the cases of Gordon[2] and Ross v. Munro[3], cases certainly entirely inter heredes, and relating exclusively to clauses of devolution. In both these cases the defender had a defence in point of law which was sustained. The case of Gordon was not a case of forfeiture. The mother of the defender had been required, when married, to bear along with her husband the name and arms of the family, otherwise to denude herself of the estate to her second son, if the eldest should represent his father in a greater estate, which would prevent his taking the name and arms. After the death of the mother, she not having taken the name and arms, the father put his then second son into possession. There were many defences, e. g. that there was no time limited, &c. But the striking part of the case is, that at the very time when, as alleged by the pursuer, the mother

[1] 2 Wilson & Shaw's Appeal Cases, App. No. 1. pp. 12, 13, 14; App. No. 2. p. 5.

[2] Mor. 2336. 7281.

[3] Mor. 7289.

of the defender was bound to denude, the defender was himself the second son. In Ross v. Munro there were two different entails of two different estates, Aldie and Newmore. In the entail of Aldie it was provided that the party taking the estate should bear the name and arms of the entailer upon his succession. By the entail of Newmore it was provided that the name and arms should not be coupled with any other name and arms. The action was founded on the entail of Aldie. The question was, if the heir entitled to succeed to Aldie could claim that estate, although he coupled the name and arms of Newmore with those of Aldie. The Court held that as there was no provision in the entail of Aldie against coupling the name and arms, the heir was not barred from claiming Aldie. Here, again, there was clearly no opportunity to grant equitable relief. It was a pure question of law. How could there be a forfeiture when the question was whether the heir was entitled to claim the estate?

But even if the respondent could have adduced cases in which, in similar circumstances, the Court had ex officio interfered to prevent a decree of declarator of devolution, it is easy to see a principle on which this might be done, without in the slightest degree impairing the efficacy of clauses of devolution in general. The Court might refuse to decern in the declarator where a party is required to do an act, and no time is specified within which it is to be done, because in such case there is in reality no contravention (or at all events the Court would be entitled so to assume) till a judicial requisition is made for performance by the very action then in dependence.

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There is not, therefore, a decision or authority of any kind in the law of Scotland which tends to sanction in the slightest degree the attempt which has now been made by the Court of Session to give relief to the respondent by means of the doctrine of purgation. Every authority in the law of Scotland, on the contrary, directly negatives the possibility of applying purgation to the present case.

Bankton[1] lays down the law thus: "The Lords of "Session, in declarators of irritancy for contracting "debt, allow some time to the contravener to purge "the irritancy by payment of the debts; but where the "irritancy is incurred by the heir not engrossing the "clauses in his right to the estate, they will not allow "it to be purged. (Home, decis, 47. 52. 34.) This "last is a complete deed of contravention, which sub-"jects the estate to the payment of the heir's debts, et "factum infectum fieri nequit. The titles made up in "contravention of the entail cannot be undone, but "the other only becomes such a contravention upon "the estate being adjudged for the debts, and thereby "evicted, which by purging the debts is prevented, for "eviction cannot happen until declarator is obtained."

If the appellant were attempting to set up Lord Bankton in opposition to other authorities in the law of Scotland, there might be plausible ground for disputing it. The appellant relies upon this dictum, not merely because it has the authority of Lord Bankton, but because it is consistent with the statute, because it is consistent with previous authorities on the subject, because

[1] Bankton, b. ii. tit. 3. p. 585.

it is consistent with the case of Stewart v. Denham [1], on which it is founded, and because it has been hitherto uncontradicted by any subsequent authority.

With regard to the case of Stewart v. Denham it has been said, in the first place, that it was reversed on appeal. It is true there was a reversal upon the first branch of the cause, but it is equally true that this reversal in no respect impeaches the unanimous opinion of all the judges of the day as to the second branch. These judges may have been wrong in the data on which they proceeded, but their opinion remains equally valuable at this time, when applied to a case of the same nature as that which they assumed the case of Stewart v. Denham to be. It has been said further that the case of Stewart v. Denham was so decided, not simply because the Court had assumed that the defender there had contravened the statute by omitting the restraining clauses in the entail, but because he had likewise contracted debt. Does the statute say that it is necessary the contravener should contract debt before its provision can come into operation? The object of the statute, on the contrary, in directing the insertion of irritant clauses, is to enable the next heir to set aside all debts contracted, if they should not be purged by previous payment. The object of the statute in providing an ipso facto devolution, where the irritant clauses are not inserted, is to prevent the contraction of debt, which, if once contracted, cannot be set aside. Hence the only legitimate interpretation of this expression is, even if you should pay off the debts you have now contracted, that would be no purgation; you still remain in the

[1] Mor. 7257.

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situation provided for by the statute; you may still contract other debts, which a declarator founded upon the irritant clauses would not reach, because they are not inserted in the rights and conveyances whereby you hold the estate.

The case of Price has in principle been overruled by this House in Mordaunt v. Innes, affirmed 5th July 1822.[1] It was found by the Court of Session (9th March 1819) that the lease of the whole of an entailed estate was an alienation in the sense of the statute, and therefore struck at by the irritant clause. It was proposed to purge the irritancy by restricting the lease as regarded the nature and extent of the lessee's interest. This was rejected on the ground that there was no mode of converting this lease, which was a bad one, into a good one, that the party might renounce the right he had acquired, and take his chance of getting a new one; but unless there was a renunciation in toto there was an end of the matter. An attempt was made to argue in this case, and in a similar case to be immediately mentioned, that as the grantor of the lease was dead it could not be set aside, because it was necessary that the interest of the contravener should be resolved by the resolutive clause in order to annul the right acquired. To have given effect to this argument would just have been going back to the Stormonth case. The answer was clear; the resolutive clause was made by the statute dependent on its operation till the irritant clause should be given effect to. If, however, the declarator is delayed till there is nothing to resolve, in other words, if death had already resolved the interest of the contravener,

[1] 1 Shaw's Appeal Cases, p. 169.

that was no reason why the irritant clause should not operate.

In the Queensberry Executors[1] the Court of Session (7th March 1816) found that a lease for a grassum was not struck at by the fetters of an entail, although it had the effect of diminishing the rent to the next heir; in other words, alienating a part of the heir's interest. This House reversed this judgment; and in their judgment of reversal there is a remarkable expression, viz. that the Duke of Queensberry had not power to grant the lease in question. The Court of Session then proceeded, on the application of one of the tenants, to try the question whether there could be purgation by spreading the grassum over the whole years of the lease. The Court of Session held that they were bound to refuse the application; they could not make that which a party had not power to do into that which he had power to do. The case of Price was ineffectually referred to in this case. The expression in the judgment above noticed points out at once the fallacy of the theory which is alleged to have been adopted in that case; it was a virtual reversal of it.

The two cases last above mentioned, and the case of Stewart v. Denham, are the only cases in which the doctrine of purgation has been proposed to be applied where there was no defence at law, and in each and all of them the Court of Session refused it.

Assuming, however, that purgation may be applied to such a case as the present, it is denied that in the present instance matters have been de facto restored to the position in which they stood before the act of con-

[1] Shaw's Appeal Cases, p. 59.

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travention committed by the respondent, either by means of the attempt made by the respondent to connect himself in point of title with the entailed estate; or by means of the offer of caution or security contained in the paper, writing, or minute of the 2d June 1837, or by both these means combined, or by any other means.

There is no ground for holding that the respondent has completed a feudal title in his person to the entailed estate of Balbithan, by means of the attempt made by him to resign upon the procuratory of the entailer; on the contrary, the entailer not being at the time when the procuratory was so attempted to be used the vassal last infeft in the estate, the said procuratory had then become utterly inept and ineffectual; and hence the pretended charter of resignation and instrument of sasine, alleged to have proceeded on the said procuratory, are altogether nugatory and of no force or effect whatever.

If the consequence of the enactment in the statute 1685, c. 22., which provides for an ipso facto devolution of the estate, or if the consequence of the clause of devolution or conditional limitation in the deed of entail, could have been legally prevented; that is to say, if the estate did not ipso facto pass to the appellant on the completion of the fee simple title of the respondent, the respondent himself would then have been the vassal last infeft in the estate, and so could only have divested himself of his fee simple title by resignation in his own person in the hands of the superior.

It seems to have been imagined that the entail was originally feudalized, or at least it does not appear to have been distinctly kept in view that the titles first made up were not revived along with the entail, but

were de novo reduced. If the respondent had served heir of line, the estate being feudalized under the entail, in that case his service would have been a mere nullity, it would of course have carried nothing, the procuratory would not be in that case (as it clearly is where the entail had never been feudalized) exhausted or superseded by a prior or paramount title to that of the entail.[1]

It has been contended, however, as the only way of meeting this objection, that the fee-simple title having been reduced by the appellant, a way has been opened to the execution of the procuratory of the entailer. The answers to this are various, and all equally obvious. 1. The reduction is ineffectual to any extent till it is extracted, till it appears upon the records of the Court, and is thereby made known to parties dealing with the respondent (who supposing it would open the way to the procuratory) are entitled, before it is made known to them by the records of the Court, to disregard the subsequent title alleged to have been made up under the entail. It is the appellant's decree which he alone is entitled to extract or not at his pleasure. 2. The fee-simple titles are reduced only in so far as the interest of the appellant is concerned or may require; they are not reduced in toto, or invalid or defective in point of feudal form. They are not reduced because they are an inhabile title of possession, but only because the respondent individually is no longer entitled to possess upon them; they still constitute any effectual title to any party who may

[1] Stair, b. ii. tit. 6. s. 6; b. iii. tit. 2. s. 8; b. iii. tit. 4. s. 23; Erskine, b. ii. tit. 7. ss. 18, 22, 23; Lord Meadowbank, 2 Wilson & Shaw's Appeal Cases, App. ii. p. 3, 4; Lord Kilkerran, voce Minor, No. 2. p. 352; Elchies, vol. ii. p. 424.

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have dealt with the respondent during his possession upon them. 3. A reduction improbation, with consent of the Lord Advocate[1], would have been necessary to cancel or avoid these titles, if such a proceeding had been otherwise competent. Lastly, If they are annulled to any extent, because (as has been insinuated by the respondent, although he has been prudent enough to avoid averring it in so many words) they are struck at by the irritant clauses in the entail, then the appellant has already obtained decree of declarator of irritancy, after which the respondent has not been bold enough to contend that there can be purgation.

The Court have further erred, in holding that the rights and interest of the appellant, as the next heir entitled to succeed to the entailed estate of Balbithan, can be effectually secured to him by means of caution or security. There is no possibility of preserving the estate by means of caution or security, to whatever extent, in the same way and manner as before the act of contravention committed by the respondent. No caution or security of any description is or can be, in any respect whatever, equivalent to the actual subsistence of the ipsum corpus of the entailed estate of Balbithan in the line of succession pointed out by the destination in the deed of entail, uninterrupted and unaffected by any act or deed of the respondent. There can be no caution, for it is impossible to fix the amount of it. Who can tell what may be the value of the estate five years hence? Who can tell the amount at which it was valued by the entailer? General Gordon left this estate unaffectable by the debts and deeds of

[1] Stair, b. 4. tit. 18.

the respondent. Is caution or security that debts will be paid off when they attach upon the estate (supposing it should turn out at the time to be equal to the value of these debts,) one and the same thing with the estate not being attachable for debt at all? The mere supposition that an entailed estate has been placed in such a position, by the act and deed of the heir in possession, as to render caution or security necessary against the consequences thereof, is completely subversive of the existence of an entail.

The application of caution or security to cases of contravention of entails has been hitherto altogether unknown and unheard of in the law of Scotland. If the doctrines maintained by the learned judges, one and all of them, establish any thing, they establish this, that this caution, when found, may be purged by caution the moment an attempt is made to enforce it. The vouchee in a recovery is not one iota less a man of straw than would be this cautioner for the cautioner. Here, then, are the judges of the Court of Session going far beyond the judges in England at a very early period of their legal history. The judges in England only connived at recoveries. The judges of the Court of Session have themselves invented and attempted to put in force a mode of defeating the statute of entails in Scotland equally fictitious, equally illegal, and equally efficacious with these very recoveries. Such attempts have been uniformly condemned by the highest authorities in modern times.[1]

[1] Lord Chancellor in Queensberry cases, Bligh's Rep. vol. i. pp. 435—460; Lord Redesdale in ditto, ditto, p. 497; Lord Wynford in Stewart v. Fullerton, 4 Wilson & Shaw, p. 231; Lord Chancellor in Roxburgh cause, Dow's Rep. vol. ii. p. 208.

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The Court have further erred in holding that the said entailed estate of Balbithan is only liable to be attached or affected by debts or deeds of the respondent contracted or committed by him prior to the 9th day of June 1835, being the date of recording the said pretended instrument of sasine; whereas, by the proviso adjected to the enactment in the said statute, creating, as aforesaid, an ipso facto devolution, it is in terminis declared that every bonâ fide contractor with the respondent is entitled to take advantage of his fee-simple title, (which still remains on the records unextinguished and in subsistence,) during the whole course of the respondent's possession of the said estate of Balbithan.

The clause in the deed of entail as to purging adjudications, &c. has no application whatever to the present case; it applies to entailers debts, statutory burdens, and such others as would not be affected by the entail if perfect in all respects; and there is no other clause in the said deed of entail in the slightest degree inconsistent with or tending in any respect to impede the operation either of the foresaid enactment in the said statute or of the said clause of devolution or conditional limitation contained in the said deed of entail.

It was an error to dismiss the action and decern against the appellant, for (contrary to the expressed opinions of the Court on the subject) the respondent has not found caution and security, but has, in terms of his said minute, merely offered to find the same.

The Court ought not to have overlooked and disregarded the inequitable, unjust, and improper conduct of the respondent, in obtaining the decree in absence, which he made the basis of the proceedings subsequently adopted by him in contravention of the entail; whereas

that conduct ought necessarily to have formed a most material element in judging of the propriety of extending towards the respondent the benefit of equitable relief, if such relief could otherwise competently have been granted.

Appellant's Argument.

The established rules of pleading have been contravened, in allowing the minute of the defender, which contains various new statements of fact and pleas in law, to be adjected to the steps of procedure after the record had been finally closed, and in sanctioning, recognizing, and adopting as the basis of the judgment proceedings begun and carried through by the respondent after the record had been closed and the pleadings between the parties to the whole action finally settled and adjusted.

Respondent's Argument.

Respondent.—Most of the points which have been discussed have really nothing to do with the question at issue, which is simply this, whether this irritancy can be purged? What has been said about devolving clauses, clauses passing over the estate, is the result of English notions entirely. In Scotland it is all effected by penalties and forfeitures. The appellant himself when he raised his action, never dreamt of any thing but proceeding as for a penalty. There is not a word in the summons about conditional devises or shifting or devolving clauses. His claim is put entirely upon the ground that there was a forfeiture. He rests his case upon the fact that there has been an irritancy incurred. Irritancies are always understood to imply penalties and forfeitures, and it is remarkable enough that it is only the irritant clause which the statute requires to be inserted in the rights

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and conveyances by which the estate is held. The clause in the entail as to redeeming adjudications is of itself sufficient to meet the present case. Irritant clauses are always used in settlements and other gratuitous rights. Entails are regulated by statute, and a statutory irritancy has no greater force than a conventional one. It never has been adopted as a doctrine in the law of Scotland that statutory irritancies any more than other irritancies can be enforced without a previous declarator. This is proved by Erskine, b. iii. t. 8. s. 32.

It has been said that purgation is a defence, and should have been pleaded as such; but it is no defence; it assumes that the pursuer may succeed in his action. The cases of Gordon and Ross were decidedly cases of purgation, and have been always so understood. In the case of Maclachlan [1] an irritancy had been incurred by executing a disposition of the estate; the conveyance would have stood good but for purgation. In the case of Price [1] there was a decided act of contravention. There was an adjudication of the absolute fee of the estate, which was clearly an irritancy, and yet when the creditors came forward, and offered to restrict their adjudications, they were allowed to do so by means of purgation. The Bargeny case is one of the strongest instances that can be put. This matter of purgation was there anxiously and deliberately discussed, both in the Court of Session and in this House, and Mrs. Fullerton lost her cause on the grouud that it required declarator to enforce an irritancy.

[1] Supra, p. 448.

It has been said that the respondent could not renounce the fee-simple title; he had no occasion to renounce it; it was merely kept alive by the decree. The appellant reduced it, and set it aside by the conclusions of his own summons. Knowing that the effect of his summons could be no other than that of opening the way for the respondent to connect himself with the entail, there is actually a conclusion in his summons calling upon the respondent to make up effectual titles under the entail. If, as he says, these fee-simple titles cannot be removed out of the way because what has been done cannot be undone, how does the appellant himself propose to make up titles if the succession should open to him?

The only real difficulty in this case was as to the effect of debts which might have been contracted during the respondent's possession in fee simple. By the completion of the entail title the estate is effectually protected against all the debts and deeds of the respondent of a posterior date. With regard, again, to debts and deeds of date prior to the date of the title under the entail, the appellant has not even alleged that any such debts or deeds exist. In addition to this, the respondent has positively averred that none do exist; and to afford absolute security against all possibility of risk, the respondent (although he holds it to be unnecessary, both because the risk is purely imaginary, and because he does, with all deference, consider it not essential in point of law to his absolvitor,) has offered the most ample caution that no debt or deed contracted, made, or granted by him while he possessed on the fee-simple title shall come against the estate.

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Respondent's Argument.

No special plea can be successfully raised upon the terms of the entail act, and so far the case is to be dealt with in the same way as any other case of irritancy. It should be particularly observed, that, in terms of the entail of Balbithan, there are various irritancies which may be incurred by the heirs of entail. Irritancies may be incurred by acts of commission or acts of omission. Of the former there are several irritancies provided for; such as, an irritancy by selling or alienating the estate or a part of it, an irritancy by executing a deed altering the order of succession, or an irritancy by contracting debt; —an irritancy by making up a title in fee simple, instead of a title under the entail, containing all its conditions, provisions, and limitations. These are all separate and distinct acts of contravention, and each involves a separate and distinct irritancy; the sanction of forfeiture applies to all and each separately. The action for enforcing the irritancy must declare upon each separately; and to each, as a separate and distinct case against him, the contravening heir has his separate and distinct answer. Among other answers to the action, the heir has the equitable answer of the irritancy being purgeable, which the law admits of, in order to save him from the penalty of forfeiture; and as the acts of contravention and relative irritancies are separate and distinct, so is the purgation, as to each, a separate and distinct purgation.

Now it is to be particularly observed, that the precise act of contravention committed in the present case, and through which the particular irritancy founded on was incurred, was the specific act of making up a fee-simple title. To the action for declaring the forfeiture of the

respondent's right to the estate in respect of the irritancy thus incurred, the respondent pleads that he is ready to purge the irritancy, and that he has done so; and the purgation which he founds on is the annulling the fee-simple title,—the deed or act done in contravention of the provisions of the entail, and the having made up in room and place of it a title in terms of the entail, in virtue of which he is now possessing. This (assuming what has been elsewhere proved, that purgation is generally admissible of irritancies in entails,) the respondent maintains is of itself, and without any thing farther, complete purgation in the particular case.

According to the view of the appellant the respondent is to be deprived of the estate, not for what he has done in contravention of the restraints imposed by the entailer, but for what he has not done, or for not being able to prove that he has not done what he has not done. He has undone what he had done; he has fully purged the irritancy, if no more was done; but still the penalty of forfeiture is to be inflicted, not because he has done any other act in contravention of the entail, but because he cannot prove the negative. The respondent's right is not to be forfeited for making up a fee-simple title; for, if the case is confined strictly to that, if no other element is brought into it, the pain of forfeiture has clearly been saved by the completing an entail title. His right is to be forfeited, because there are other irritancies provided by the entail for the cases of contracting debt and alienating the estate in whole or in part. It is to be forfeited in respect of the provisions in regard to these irritancies. Now the effect

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and result of this are, that upon a conjectural possibility that deeds of alienation may have been granted, or debts may have been contracted, and irritancies thereby incurred, the respondent's right is to be forfeited without his being allowed an opportunity of purging the irritancies, (for it is clear that in the state of the case purgation is excluded,) and consequently the respondent is to be forfeited under circumstances in which he could not be placed if there were distinct evidence that the irritancies had certainly been incurred, and the present were an action of declarator of contravention founded on them. Thus, then, the respondent is to be in a worse situation in the hypothesis of the possible existence of that which is improbable, than he would be in had he positively contravened the prohibitions of the entail by alienating the estate or contracting debt, on which adjudication had been led against it. If the respondent had granted a deed of alienation, the resolutive clause applicable to that act could not operate so as to infer forfeiture till he had had an opportunity and had failed to purge the irritancy so incurred. In the same way, if debt had been made the ground of diligence against the estate, purgation would have been competent before decree of declarator could have been obtained.

There is no principle or authority for thus forfeiting the right of a party who has incurred an irritancy under an entail, on the ground that he may by possibility have incurred another and different irritancy. The singular and extremely penal effect of such a proceeding affords the strongest argument against it, and for the necessity of viewing each irritancy separately in the question of

purgation, and not permitting the one to be mixed up with the other. The opposite course is not more unjust to the contravening heir of entail than it is irreconcileable with what must be assumed to be the view of the entailer, as well as unnecessary for securing the estate to the heirs agreeably to his will.

Respondent's Argument.

Judgment deferred.

LORD CHANCELLOR. — My Lords. In this case of Abernethie v. Forbes considerable difficulty was felt by the learned Judges below, and although the judgment below was unanimous, yet several of the learned Judges expressed considerable doubt as to the conclusions to which they ought to come.

Ld. Chancellor's Speech.

The defender (the respondent) was heir of line of General Gordon; he was also entitled to him and the heirs male of his body, subject to the life-rent of his father, William Forbes, under a disposition and deed of entail of 1803 of the same General Gordon; failing heirs of the body of the respondent, the appellant was next entitled under this entail. William Forbes and the respondent made up their titles under this entail; but after the death of William Forbes, in 1815, the respondent raised an action of reduction of the deed of entail, and of the charter of resignation and instrument of seisin, under which he held the lands, alleging that the deed of entail was void, and claiming the estate as heir of line. This suit proceeded in the absence of the appellant, and the respondent obtained a decree of reduction; finding that there was a blank in the deed of taillie at the time it was executed, and that an important

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clause was afterwards inserted in the blank space, and that the said deed was false in its date, and therefore reducing, decerning, and declaring in the terms of the libel. Upon this the respondent, in 1822, caused himself to be infeft, as nearest and lawful heir of line of General Gordon.

The summons in the present suit, after stating these proceedings, alleges that such proceedings and other acts of the respondent, namely, his omitting to bear the arms and name of the entailer, were in contravention of the deed of entail, and ought to reduce the decree in absence and all the subsequent instruments, and to establish the entail; and that it might be declared that the respondent had committed a contravention of the provisions of the entail, and had incurred an irritancy, and had thereby forfeited his interest in the estate, and that the pursuer had become entitled; the having subjected the estate to debts, however, was not alleged as an irritancy founded on.

The respondent (the defender) endeavoured to support the decree and the objections to the entail; but, by an interlocutor of the 4th of July 1834, the Lord Ordinary held, that the objections to the entail were not valid, and therefore reduced, and decerned in the reductive conclusions of the libel; but superseded the consideration of the other conclusions of the libel, as to the defender having incurred an irritancy, and the pursuer being entitled to enter into the possession of the estate, till that interlocutor and the decreet of reduction should be final.

This interlocutor having been adhered to by the Inner House, the respondent obtained leave to lodge a minute,

in which he stated that he had revived the name of the entailer, and that he had been served heir of taillie and provision under the entail, and that he intended to procure a Crown charter, on the procuratory of resignation contained in the said deed of entail, which was afterwards done. Various proceedings took place, the result of which was, that the Court held it to be competent for the defender, in that stage of the cause, to offer to purge the irritancy; and, by an interlocutor of the 20th of June 1837, in respect that the defender had made up and completed his titles under the deed of entail, and had offered to find security that there were no debts contracted by him which could affect the estate, and that no such debt should ever be made available against the estate, dismissed the action, but found the pursuer entitled to expenses.

Against these several interlocutors, permitting the defender so to meet the pursuer's claim to the estate by an offer of purgation, and adjudging the purgation to be sufficient, the present appeal was brought.

Upon the merits, that is, whether the acts done by the defender are capable of purgation, it must be observed, that if the rule of the law of Scotland admit of it, there cannot be a more favourable case for the application of the rule. What he did was under the sanction of a declarator of the Court of Session, by which the defender was informed that the entail was void; and although this was obtained in absence, there does not appear to be any ground for impeaching that transaction as fraudulent. The appellant was at that time out of the kingdom, and could not have been made a party to it.

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Some confusion seems to exist as to the cases in which purgation is allowed, from the same courts exercising the jurisdiction of law and equity. In this country there is no such difficulty; our courts of equity exercising the jurisdiction in certain cases in relieving against forfeitures, but not to the same extent as is practised in Scotland. In Scotland, as in this country, questions arise as to whether the provisions in question operate as (to use English terms) conditions or limitations. If as conditions, that is, if they be penal, then no title accrues to the party claiming, without a declarator; and the question is, whether the party may not escape from the consequences of the act complained of at any time before the irritancy is declared, by doing what has been omitted, or undoing what has been done amiss, so as to secure all parties claiming under the entail in the enjoyment of what the entailer intended for them.

In Mr. Sandford's Treatise on Entail Law, page 294, several cases are quoted in which purgation is allowed before irritancy is declared, although the act be a direct infringement of the provisions of the entail; such as, an actual disposition to a purchaser, granting leases or feus and contracting debts.

The case of Raploch (6th July 1760), quoted in the cases between the Duke of Buccleuch and the Queensberry executors, strongly illustrates the length to which this doctrine of purgation has been carried. A tenant for life had permitted adjudication against the estate by creditors of his own and of the entailer, contrary to the prohibition in the entail. The irritancy was not disputed, but the creditors undertaking to con-

fine their claims to the life estate, the claim of the next heir under the entail claiming under the forfeiture was rejected.

In the Bargeny case, (Morrison, 11,171,) the Lord Justice Clerk and Lord Meadowbank put the question upon this, whether the effect of the contravention can be done away with? Lord Armadale is made to say, "All contraventions which de facto can be purged may "be so before declarator."

After a careful examination of the cases relied upon by the appellant, I do not find any which ought to induce your Lordships to abstain from adopting the doctrine so laid down. The ground taken upon the construction of the act of 1685, cap. 22, has, I think, met with a sufficient answer; the irritancy relied upon is, I think, capable of purgation. The question, therefore, comes to this: whether what has been done by the contravener has the effect of placing the title of the pursuer and those who claim under the entail in as good a situation as they would have been in if the contravention had not taken place? The possible claim of creditors, if created whilst the defender held under the improper title, is the only plausible ground for this objection. It is answered to this, that the pursuer has not only not proved, but that he has not alleged, the existence of any such debts; and as the negative cannot be proved, the yielding to this suggestion would, in all cases in which such claim of creditors is possible, create an impossibility of purgation.

Under these circumstances, and to guard against this non-apparent and unalleged danger, the Court has required security from the defender. If the existence

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of any such debts had been proved, or if there appeared to be any probability of their existence, and if the pursuer had founded upon their existence, it might be said that the course adopted by the Court did not afford an adequate protection; but under the circumstances I cannot but think that it was quite as much, if not more than what the pursuer was entitled to require. If the contravention relied upon and proved had been the permitting debts to become a charge upon the estate, it cannot be disputed that removing such debts before a declarator of irritancy upon that acconnt would have been a purgation, and yet in such case there would remain a possibility of other debts. Yielding to this objection would be giving to the supposed possibility of the existence of debts greater weight and more effect than to the actual proof of debts, because the effect of the latter might be removed by relieving the estate from them, which would be impossible so long as their existence was unknown.

As to the form in which the defender was let in to show the purgation of the irritancy which had been declared, it is purely a question of practice of the Court, not provided for by the judicature act; and if the case was one in which purgation was admissible, it does not appear in what better manner the title to purge could have been admitted. It was not treated as an answer to the action, but as a sufficient reason for not permitting the action to proceed; and the mode adopted was within the competency of the Court. It was alleged that the Court of Session, although they required security, had not taken proper means to obtain

that security: it was assumed that the action had been absolutely disposed of. I apprehend that that, however, was not the case. The security was directed to be given; I apprehend that the Court of Session intended the security should be given; in the result they adopted the course of providing for that security which had been suggested by the respondent's minute, but it would not have made any difference in the finding of the Court, even if security had been provided for otherwise, because, though it was proper that the Court should require that security, there was no allegation of the existence of any such debts. I think it was a larger benefit than the pursuer was entitled to ask; and although there was very considerable doubt expressed by the learned Judges in the Court below, yet, it being an unanimous opinion of the judges that purgation ought to be admitted, and that the defender ought to be protected in the enjoyment of his estate, I think your Lordships cannot adopt a more wholesome rule than that where a party gets an affirmance of the judgment of the Court below, — the party who succeeds should be, as far as costs are concerned, indemnified; and, therefore, I should propose to your Lordships to affirm the interlocutors, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the said costs, certified as aforesaid, shall be paid to the party entitled to

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the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1840.

[10*th August* 1840.]

The Countess of DALHOUSIE and others, Appellants.[1] (No. 20.)

[*Sir F. Pollock — Knight Bruce — Burge.*]

JAMES M'DOUALL, Respondent.

[*Attorney General* (*Campbell*) — *Lord Advocate* (*Rutherfurd*).]

Marriage — Legitimation per subsequens matrimonium — Domicile. — A., a domiciled Scotchman, cohabited with M., an unmarried woman, a native of and resident in Scotland; they went to England, and had a son born there. Several years after the birth of J., his parents, A. and M., by a written contract, made at Penrith, acknowledged themselves husband and wife, and soon after went to Scotland, where they cohabited together as husband and wife, and were habit and repute married persons till A.'s death. A. died possessed of entailed estates in Scotland: — Held (affirming the judgment of the Court of Session) that J. was the legitimate son of A., and as such entitled to all the rights and privileges of a child born in lawful wedlock. (See also next case, Munro v. Munro, p. 492.)

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[1] 16 D., B., & M., 6; and Fac. Coll., 15th Nov. 1837.

1st Division.

Lord Ordinary Fullerton.

Statement.

COLONEL ANDREW M'DOUALL of Logan in Wigtonshire, now deceased, was born in Scotland. He possessed the estate of Bankton and others, to which he succeeded as heir of entail. He had always been domiciled in Scotland, when, in September or October 1795, he formed a connexion with Mary Russell, residing in Dumfries. She was then about sixteen years of age, and unmarried, living with her mother, who had separated from her father. She had been born in Scotland; her parents were Scotch, and she had never had any other than a Scotch domicile. Colonel M'Douall took her to his house, where she shared his bed and board. In April 1796 a regiment of fencible cavalry, of which he was in command, received orders to march to Carlisle, and he took Mary Russell along with him. She was then pregnant; and on the 28th of April the overseers of the parish of St. Cuthbert, Carlisle, exacted a bond from Colonel M'Douall, to the amount of 50*l.*, that her child being illegitimate should not become chargeable to the parish.

In October 1796 Mary Russell was delivered at Chester of a son, who was baptized James. During the intervening period of about six months from the time of her having left Scotland Mary Russell had remained in England along with Colonel M'Douall, who was stationed there with his regiment. The regiment was disembodied in 1800, at which time Colonel M'Douall returned to reside in Scotland. During the time of his being stationed in England he had always kept a house in Scotland, and an establishment there suited to his condition in society; and as his father died in 1799, he went on his return to reside at Logan, the family seat. During his whole stay in England Mary Russell had

always accompanied him to the different quarters where he was stationed, and had lived with him; but he now took a house for her in Penrith, where he frequently visited her. Several other children were born of this connexion; one of whom, John Andrew, survives. The expenses of maintaining the house at Penrith and providing for Mary Russell and her children were paid by Colonel M'Douall, who in 1802 purchased the house in which they lived. Mary Russell continued to live at Penrith until 1808, her mother and a brother and sister residing with her. After she left the house in 1808 her mother remained in it till her death, after which her brother occupied the house.

In March 1808 Colonel M'Douall and Mary Russell signed a written contract of marriage at Penrith, accepting each other as spouses, and containing provisions out of Colonel M'Douall's estate, settled on her as his wife in the event of her survivance, in security of which she was soon after infeft. Colonel M'Douall then took her to his house in Scotland in 1808, and publicly declared their marriage. They continued to live together as man and wife in Scotland until Colonel M'Douall's death in 1834, and were habit and repute married persons; they treating their sons as their lawful children. Colonel M'Douall and Mary Russell had never contracted any other marriage. In 1817 Colonel M'Douall made up titles under the entail of Bankton, &c., "in "favour of himself in life-rent and James M'Douall, his "eldest lawful son, in fee."

In 1831 Colonel M'Douall and his eldest son James raised an action in the Court of Session, directed against the second son, and also against the Countess of Dalhousie and the other heirs of entail of the estates of Bankton, &c.

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The conclusions of the summons were, " that it ought " and should be found and declared by decree, &c. that " the said James M'Douall, pursuer, is the eldest law- " ful son of the said Andrew M'Douall, and as such is " entitled to all the rights and privileges of a child born " in lawful wedlock; and it ought, &c. be found and " declared that the said James M'Douall stands lawfully " vested with the fee of the said lands and others above " described, subject to the life-rent of the said Andrew " M'Douall, pursuer; and it ought, &c. be found and " declared that the said Andrew M'Douall and the said " James M'Douall, for their respective rights of life- " rent and fee, hold and enjoy the said lands and others " above described in fee simple, and free of all the " fetters, restrictions, and limitations intended to be " imposed by the said deed of entail;" and there were further conclusions as to the right of the pursuers to sell the lands, &c.

In defence the Countess of Dalhousie and her son Lord Ramsay, besides the pleas on the merits, stated a preliminary defence, that the action was incompetent, as combining a conclusion for declarator of legitimacy, which is a question purely consistorial, with a declarator relating to real property; which last is competent only to the supreme court.

Supplementary summonses, containing only the first of the above declaratory conclusions as to the pursuer James M'Douall's legitimacy, were accordingly raised by the pursuers; 1st, against the Countess and Earl of Dalhousie and their sons; and, 2dly, against the other heirs of entail; and these actions were conjoined with the original action of declarator.

The defence on the merits was, that " the pursuer, " James M'Douall, is not the lawful son of the pursuer,

" Andrew M'Douall and Mrs. Mary Russell. He was " born in England, while his mother was domiciled in " that country, and before any marriage had taken " place between her and his reputed father. By the " law of England he was born a bastard, and by the law " of that country, which must regulate the status of " persons who are born there, the character of bastardy " is indelible."

Statement.

On the death of Andrew M'Douall, in May 1834, the Countess of Dalhousie raised an action of reduction, improbation, and declarator, for the purpose of having her right as next heir of entail to the estate of Bankton, &c. declared. This action was conjoined with the previous actions.

A proof was led by both parties, and, after a debate thereon, cases were ordered by the Lord Ordinary, who made avizandum with the same to the First Division of the Court. Their Lordships (23d December 1836) directed the printed papers to be laid before the whole other Judges for their opinions thereon.

A note was thereafter given in for the parties, suggesting that the opinion of the consulted Judges might be given upon a specific question. The Lords of the First Division pronounced an interlocutor, (25th February 1837,) requesting the opinion in writing of the other Judges,—" Whether the pursuer James M'Douall " is the legitimate son of the late Andrew M'Douall " of Logan?"

The following opinions in writing were returned by the consulted Judges: — *Lords Justice Clerk (Boyle), Glenlee, Meadowbank, Fullerton, Moncreiff, Jeffrey, Cockburn, and Cuninghame:* — " All the facts which " appear to us to be material for the decision of this

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"cause are, in our opinion, so clearly proved, that we "do not think it necessary to enter into the details of "the evidence regarding them.

"Though there be no evidence that at the time "of the first intercourse between the late Andrew "M'Douall, Esq., of Logan, and Mary Russell, or "before the birth of the pursuer, a matrimonial con- "sent had legally passed between them, it is clearly "established that in the year 1808 they, by a solemn "written contract, acknowledged themselves to be "married persons, husband and wife to one another, "and that they did thereafter constantly live and "cohabit together in Scotland as husband and wife, "and were universally habit and repute married per- "sons from that time till the death of the said "Andrew M'Douall, in the year 1834. We can "entertain no doubt whatever that these facts are "sufficient to establish a completed marriage, indis- "soluble by the will of either or both of the parties, "according to the settled law of Scotland.

"It does not seem to be denied, and at any rate is "clearly proved, that the pursuer James M'Douall "is the son of the parties who were so united in mar- "riage, born at Chester in England on the 19th "October 1796; and we also think it abundantly "shown in evidence, that he was acknowledged as their "lawful son, at least at all times posterior to the "public declaration of their marriage in 1808.

"We also think it very clear upon the evidence, "that the late Andrew M'Douall, the pursuer's father, "was during his whole life a domiciled Scotchman; "that having been born, brought up, and educated "there, he never for a moment lost his domicile of

" origin, or acquired any other domicile to supersede " it; that, though locally present in England at the " time of the pursuer's birth, he was even then legally " domiciled in Scotland, being only resident in Eng- " land on military duty; and that he was undoubtedly " both legally domiciled (and actually resident in Scot- " land) during all the public cohabitation with the " pursuer's mother as husband and wife, during " twenty-six years after the acknowledgment of their " marriage.

" We are of opinion, that upon these indisputable " facts, without the necessity of any farther inquiry, " the pursuer is, by the settled rules of the law of " Scotland, the legitimate son of his parents, and is " entitled to have such his status of legitimacy declared " in terms of the conclusions of the summons in this " action; for, though in the absence of all evidence " that at any time previous to his birth, or in parti- " cular at the time of his procreation or conception, a " matrimonial union of his said parents had been " formed by celebration any where or by consent duly " adhibited in Scotland, he could not at the date of his " birth have been declared to be legitimate, the mar- " riage between them thereafter fully constituted by " the law of Scotland had, by the established rule of " that law, the effect of vesting in him all the rights " of a lawful child, as truly as if there were evidence " of a marriage entered into before his birth. The " principle of legitimation per subsequens matrimonium " being firmly rooted in the law of Scotland, and uni- " versally acknowledged and enforced for centuries " past, we need make no reference to authorities to " prove it. And it being so fixed, it is incumbent on

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"any one who denies its application to such a case as "that now before us, to show some ground of exception recognized by that law to exclude it.

"The defenders seem to rest their case for denying "the pursuer's legitimacy on two points:—1. That "the pursuer having been born in England before the "marriage of his parents, and the law of England not "acknowledging the principle of legitimation per subsequens matrimonium, the status of illegitimacy was "stamped on him at his birth, and became indelible; "and, 2. That his mother at his birth or after it was "domiciled in England.

"Unless this last point is in some way to be connected with the first, we do not well understand the "bearing of it; for, if the pursuer had been born in "Scotland, we imagine that it would scarcely be maintained that the circumstance of his mother having "at any time acquired an English domicile could in "any manner obstruct the operation of the principle of "the law of Scotland, after she was married to the "pursuer's father by a Scotch marriage, and fully "domiciled in Scotland. But indeed this point of the "domicile of the pursuer's mother appears to us to be "really immaterial to the question. On every supposition in the state of the evidence, if the time and "circumstances of the pursuer's birth are to be "inquired into, it must be taken as matter of fact "that he was born illegitimate, whether the law of "England or the law of Scotland be considered; and "he would be so equally whether his mother had her "domicile in England or in Scotland. If it is to be "held that the rule of the law of England, which holds "a person born there to be incapable of being legiti-

" mated by the subsequent marriage of his parents, " must control the law of Scotland in regard to the " effects of a Scotch marriage afterwards entered into " with a domiciled Scotchman, as it may regulate the " interests of all persons domiciled in Scotland, that " will of course decide the case. But if that cannot " be held generally, it is not obvious to us how it " could make any difference on that point, though " it could be assumed that the mother had a domicile " in England at the time of the birth. If the law of " Scotland cannot be so controlled in respect of the " place of birth, the domicile of the mother cannot " produce that effect.

" So far as the point may be thought material, we " are of opinion that it has by no means been made " out that the pursuer's mother was domiciled in Eng- " land at the time of the birth. She was a native of " Scotland, completely domiciled there, and never out " of it till she went with Colonel M'Douall into Eng- " land, in April 1796, after the pursuer's conception. " It is evident to us that she must be regarded as " having been then in the capacity of a companion or " servant to Colonel M'Douall; a part of his esta- " blishment, whose movements were entirely guided by " his; and that, if it be clear that he was not in Eng- " land animo remanendi, so as to lose his Scotch " domicile, as little was she. The effect of what " happened afterwards may be more doubtful. But " up to the time when the pursuer was born at Chester, " his mother was entirely guided in her residence and " movements by the residence and movements of his " father. It does not appear that she had then esta- " blished any domicile of her own, either at Chester or

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"any where else in England; and if she had died in "the child-birth leaving personal property, we appre- "hend that the succession to it would have been "regulated by the law of Scotland.

"We farther think it not at all clear that the lady "afterwards acquired a domicile in England, or resided "there in the proper sense animo remanendi, as she "always occupied a house held by Colonel M'Douall, "supported by him, and subject to his control; and "there seems to be no reason to believe that she ever "intended to abandon her Scotch domicile. If she "did so, it was not at Chester that she was so domi- "ciled. But supposing that by a mode of residence "in England, taken up some time after the birth and "continued till 1808, she became legally domiciled "in England, we are of opinion that such her "domicile cannot in any manner affect the present "question.

"On the first point above mentioned, the supposed "indelibility of the status of illegitimacy because "of the locality of the birth and the rule of the "law of England on the subject, we are, with all "deference to any other views which may be taken "of it, of opinion that it is not sanctioned by any "authority in the law of Scotland, or by the principles "delivered by the best writers on general law. We do "not here speak of what might be the effect of any "positive conflict of the laws of Scotland and those "of England. We must presume that the courts "of England, if called upon in a matter belonging "to their jurisdiction, would decide on sound prin- "ciples according to their own views. But the question "here is, what shall be the effect of a Scotch marriage,

" contracted between persons domiciled in Scotland, " and who continued to be thereafter domiciled in the " paternal mansion-house of the husband till his death? " What shall be the effect of such a marriage on the " status of the child of such parents, claiming that " status in a Scotch court, and in regard to important " interests on which it belongs to those courts alone to " decide? And in this state of the question, we are " bound to state our decided opinion that the place " of the pursuer's birth, or the law of that place " which would be applied to an English marriage " and a domiciled English husband, can form no bar " to the operation of the settled rule of the law of " Scotland in relation to such a case as that now " before us.

" We say this with the most perfect deference and " respect for certain dicta, which appear to have been " seriously suggested by persons of the highest emi- " nence as authorities in the law. But all the cases " in which these suggestions of opinion occurred " appear to us to have been clearly decided and to " rest firmly on other grounds. In all the three cases[1] " of Sheddan v. Patrick, Strathmore, and Ross the " judgments mainly proceeded on the domicile of " the parties; and in the last especially the point " of indelibility from the place of birth was expressly " waived by the Lord Chancellor Lyndhurst. Judg- " ing, therefore, by all the light which we possess on " the subject, our deliberate opinion is that above " expressed."

Lord Medwyn.—" I concur in the foregoing opinion: " at the same time I wish to bring more prominently

[1] See post, p. 586.

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" into view the features of the case which chiefly affect " my mind.

" The late Colonel M'Douall of Logan was in " 1795 employed to raise a regiment of fencible " cavalry. It was embodied at Dumfries, and he " marched with it into England on 9th April 1796. " It was not and cannot be disputed that at this " time Colonel M'Douall was a domiciled Scotsman, " and that this domicile could not be affected by his " absence on military duty.

" Some time in the course of the year 1795 Mary " Russell went to reside with Colonel M'Douall at " Dumfries and elsewhere in Scotland, and she became " pregnant. She continued to reside with him, and " accompanied him into England when he went there " with the regiment in April 1796. She was a Scotch- " woman, and till then never had been out of Scot- " land. She was at this time visibly with child, so that " the overseers of the poor of Carlisle obliged Colonel " M'Douall to grant a bond, dated 28th April 1796, " that her child should not become a burden on the " parish.

" James M'Douall, the pursuer, was born at Chester " on 19th October 1796, and of course the period of " his conception took place when both his parents were " in Scotland, and where they were both domiciled.

" Colonel M'Douall and Mary Russell executed, at " Penrith in Cumberland, on 9th March 1808, a mar- " riage contract in the Scotch form, by which they " accept each other as lawful spouses, and by which " he settled upon her, if she should survive him, an " annuity of 400*l.*, payable from his entailed estates. " Immediately after this, Colonel M'Douall returned " with Mary Russell as his wife to Scotland, and

" sasine is taken on this contract on 12th April in " favour of ' Mrs. Mary Russell, now spouse of Lieu- " ' tenant Colonel Andrew M'Douall of Logan;' and " they continued to live as man and wife constantly in " Scotland, and were so known and recognized from " that period till the dissolution of the marriage in " 1834. The marriage was thus constituted by decla- " ration and open cohabitation alone in Scotland, and " no ceremony of marriage took place either in England " or in this country.

" Upon these facts the question arises, whether the " circumstance of the pursuer's birth having taken place " in England will prevent the operation of the law of " legitimation per subsequens matrimonium, which cer- " tainly would have taken place if Colonel M'Douall " and the regiment had been allowed to remain in " Scotland till after October 1796.

" Now this question relates solely to the effect of a " Scotch marriage between Scotch parties, and affects " the succession to a Scotch estate; and I cannot under- " stand how the law of any other country can form an " element in the determination of such a question. In " considering the application to such a case of the doc- " trine of our law, that legitimation per subsequens " matrimonium takes effect in the case of children " already born, Scotch Judges, whether in the Court " of Session or the Court of Review, can only consider " the provisions of that law.

" Now I know of no limitation of the doctrine but " that which is laid down by Erskine, b. 1. t. 6. sec. 52.: " the doctrine is not noticed by Stair: — ' The sub- " ' sequent marriage by which this sort of legitimation " ' is effected, is by a fiction of the law considered to

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" ' have been contracted when the child legitimated was " ' begotten; and consequently no children can be " ' thus legitimated but those who are procreated of a " ' mother whom the father at the time of the pro- " ' creation might have lawfully married.' The rule, " as given by Bankton, fixes on the same period, " b. 1. t. 5. sec. 54.:—' Because the law, by a fiction with " ' respect to legitimation by subsequent marriage, sup- " ' poses the parties to have been married at the time " ' of the child's conception.' And again, in explain- " ing that the marriage, though it take place after the " death of a bastard child, leaving a lawful child, will " make that child the lawful heir of his grandfather, " says, ' because it is held the same as if it had pre- " ' ceded the conception of the child,' (sec. 58.) This " was the rule also of the civil law, from which, more " especially as sanctioned by the canon law (though " upon a different principle), we adopted it along with " all the other countries in Christian Europe, with the " exception of England:—' Quia nuptiæ per jus fingun- " ' tur retro cum concubinâ contractæ eo tempore quo " ' illa primitus in concubinam assumpta fuit, atque ita " ' filius quoque retro legitimus fingitur.'[1] The words " of Boehmer[2], commenting on this rule of the civil " law, are, " Inde factum est, ut interpretes commu- " ' niter ad fictionem juris confugere, atque docere sole- " ' ant subsequens matrimonium retrotrahendum atque " ' per fictionem supponendum a tempore concubitus " ' jam adfuisse inter eos, qui postea in legitimum " ' matrimonium consentiunt, justas nuptias;' and he " adds, ' si tempore conceptionis adfuit impedimentum,

[1] Voet, lib. 25. t. 7. s. 6. [2] Jus Eccles. Protest. lib. 4. t. 17. s. 10.

" 'lex non potuerit fingere eo tempore contractum " 'fuisse matrimonium.' The rule then is, 'In his qui " 'jure contracto matrimonio nascuntur conceptionis " 'tempus spectatur;' and it is only when it is more " favourable for the child that 'tempus editionis est " 'respiciendum.' This rule was finally settled in the " Roman code by the following law of Justinian: 'Et " 'generaliter definimus, et quod super hujusmodi casi- " 'bus variabatur definitione certâ concludimus: ut " 'semper in hujusmodi quæstionibus in quibus de " 'statu liberorum est dubitatio, non conceptionis sed " 'partûs tempus inspiciatur: et hoc favore facimus " 'liberorum, ut editionis tempus statuamus esse inspi- " 'ciendum, exceptis his tantummodo casibus in quibus " 'conceptionem magis approbari infantum utilitas " 'expostulat, L. 11., C. de Nat. Lib.'

" As an illustration of this rule, I refer to the follow- " ing law of the Pandects on a kindred matter: — 'In- " 'genui sunt qui ex matre liberâ nati sunt: sufficit " 'enim liberam fuisse eo tempore quo nascitur, licet " 'ancilla conceperit: et è contrario, si libera conce- " 'perit, deinde ancilla pariat, placuit eum qui nascitur " 'liberum nasci, L. 5. § 2., de Statu Hom.'

" If the subsequent marriage is to have a retroactive " effect, so far as regards the status of a child previously " born, by a fiction which carries back the marriage to " a prior date, the natural course is to carry it back to " the period of the conception. Accordingly, we have " seen that this principle has been adopted in our law, " and it must be held to apply in the present case. " Even then, if the accidental circumstance of the " mother living in the temporary residence of his father " in England, as a part of his family or establishment

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" (he being at the time in the eye of law a domi-
" ciled Scotsman), could be supposed to affect the
" domicile of the mother at the period of the pursuer's
" birth or the decision of this case, which I think it
" could not, there seems to me to be no room whatever
" for the consideration of the place of the birth in dis-
" posing of the question of the pursuer's legitimacy.
" For at the time of conception, when, by the fiction of
" law, the marriage of the parents took place, they were
" both in Scotland, and there is not a pretence for
" holding that they had at that time any other than a
" Scots domicile, or that there was any impediment to
" marriage then taking place. And I can discover no
" circumstance which can prevent the effect of the sub-
" sequent marriage on the status of the child thus be-
" gotten; for it would not place him in a more favour-
" able situation, but it might be the reverse, to look to
" the place of his birth instead of the place of con-
" ception; and it is only when it is more favourable for
" the child that attention is to be paid to the place of
" the birth. Most clearly in the present case we can
" regard the time and place of conception only.

" Upon these grounds I am of opinion that the
" pursuer is entitled to succeed in this declarator."

The cause was put down for judgment upon the foregoing opinions at the same time as the immediately following case of Munro v. Munro, when the Lords of the First Division delivered opinions upon both cases. See the report of the latter case, *post*, p. 492.

Judgment of Court, 15th Nov. 1837.

The following judgment was pronounced by their Lordships (15th November 1837): — " Find it proved
" and established that the pursuer James M'Douall is
" the legitimate son of the said late Andrew M'Douall

" of Logan: therefore find and declare in terms of the " original and supplementary summons of declarator in " so far as respects the question of the said James " M'Douall's legitimacy: Quoad ultra, remit to the " Lord Ordinary to proceed further as shall be just in " respect to the other conclusions of the said conjoined " actions."

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The defenders appealed.

[*See the arguments, and the opinions delivered by the Lord Chancellor and Lord Brougham, in the next case of Munro v. Munro.*]

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, Solicitors.

[10*th August* 1840.]

(No. 21.) Miss MARY SEYMOUR MUNRO, Appellant.[1]

[*Pemberton — Sir W. Follett — Buchanan.*]

GEORGE MUNRO and CHARLES MUNRO, Respondents.

[*Knight Bruce — Fleming.*]

Domicile — Proof. — Circumstances regarding the domicile of a party born and having heritable estate in Scotland, in which, held (reversing the judgment of the Court of Session) that the domicile of origin prevailed, because there had been no intention to abandon it, and the party had not animo et facto acquired a new domicile.

Per LORD CHANCELLOR: — "In questions of domicile it is, "I conceive, one of the established principles, that the "domicile of origin must prevail until the party has not "only acquired another, but has manifested and carried "into execution an intention of abandoning his former "domicile and acquiring another as his sole domicile. "Such, after the fullest consideration of the authorities, "was the principle laid down by Lord Alvanley in Som- "merville v. Sommerville (5 Vesey, 787), and from which "I see no reason for dissenting." See p. 606.

Marriage — Legitimation per subsequens matrimonium — Domicile. — H., a domiciled Scotchman, proprietor of entailed estate in Scotland, cohabited with J., an unmarried woman, a native of and resident in England, and had by her a daughter, M., who was born in England. Several years after the birth of M., her parents, H. and J., were married in England: — Held (in concurrence with the opinions of the majority of the Judges of the Court of Session), that M. was the lawful daughter of H. (See preceding case of Countess of Dalhousie v. M'Douall, p. 475.

[1] 16 D., B., & M., 18; Fac. Coll., 15th Nov. 1837.

1st Division.

Lord Ordinary Corehouse.

Statement.

SIR HUGH MUNRO of Fowlis, baronet, was born in Scotland in 1763. On the death of his father, in 1781, he succeeded to the entailed estate of Fowlis in Ross-shire and to certain real estate in England. He was educated chiefly in Scotland, and for some time previous to 1789 he was on foreign travel. From that time until the year 1794 Sir Hugh resided with his mother at Ardullie, a mansion on the family estate in Ross-shire. Fowlis Castle, the principal seat of the family, was then in disrepair, and Sir Hugh at that time kept no establishment there. The real estate in England to which he had succeeded was before this period sold. In 1794 a misunderstanding arose betwixt Sir Hugh and his mother, in consequence of his proposing that she should give up Ardullie, and go to reside in Edinburgh.

In the same year 1794 Sir Hugh went to London. In August 1795 he became acquainted with Jane Law, then unmarried, who was born and domiciled in England; and this connexion resulted in the birth of a child (the appellant), who was born in London on 15th May 1796. Sir Hugh's usual place of residence was for some years afterwards in Gloucester Place, London, where he had taken a house on lease. In September 1801, Sir Hugh and the mother of the appellant were married in London according to the forms of the English church. In the certificate of marriage the parties were respectively designed as bachelor and spinster, both of the parish of St. Mary-le-bone. In the usual affidavit sworn by Sir Hugh, it was stated that he was of the parish of St. Marylebone, and that his usual place of abode had been in the said parish for the space of four weeks then last past.

In October 1802 Sir Hugh and Lady Munro, with

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their child, went to Scotland; and they resided at Fowlis Castle in family as husband and wife from November 1802 until August 1803, when Lady Munro was drowned whilst bathing.

Sir Hugh and his daughter, the appellant, resided at Fowlis Castle until 1808, when the latter was taken by her father to London for the benefit of education. From that period till 1817 Sir Hugh usually resided in his house in Gloucester Place, London, occasionally going to Scotland. From 1817 till 1820 he was resident entirely in Scotland, and thereafter he chiefly resided in London.

Under an entail executed in 1776 by Sir Hugh's father the estate of Fowlis was destined in favour of a daughter on failure of male issue of Sir Hugh. The next heir, after Sir Hugh and his issue male and female, was George Munro, late of Culrain (respondent). In 1831 Miss Munro, the appellant, raised in the Court of Session an action of declarator of her mother's marriage, her own legitimacy, and her right to succeed to the estate of Fowlis, failing her father Sir Hugh without male issue. The defenders called were Sir Hugh and the other heirs of entail. The conclusions of the summons were "that the deceased Dame Jane "Law, the mother of the pursuer, was the lawful wife "of the said Sir Hugh Munro, defender; that she "cohabited with him as such during several years, "residing with her said husband at his hereditary "mansion-house of Fowlis in the county of Ross in "Scotland, where she was fully acknowledged by him "and by the whole neighbourhood, and by all their "friends and acquaintances and visitors, as holding "lawfully and rightfully the stile and title of Lady

"Munro, and was in all respects habit and repute the "wife of the defender the said Sir Hugh Munro, the "father of the pursuer, who was reared, brought up, "and acknowledged and educated by him and his wife "as their lawful child, and presented as such to all "their friends, relations, and connexions, and held out "in that character to the public at large. And further "it ought, &c. to be declared, &c. that the pursuer, as "lawful daughter, and at present only lawful child, of "the said Sir Hugh Munro, is entitled, failing her said "father and heirs male of his body, to succeed to the "estate of Fowlis and others, in virtue of the clause "of destination and other clauses in the entail afore-"said, and that she has a vested interest therein and "jus crediti over the same as heir female procreate of "the body of the defender Sir Hugh Munro, designed "in the said entail by the entailer, as 'Hugh Munro "'my eldest son;' and the defenders ought to be pro-"hibited, &c. from disputing in time coming the "pursuer's right of succession."

Sir Hugh lodged defences admitting that the action was well founded. George Munro and his son Charles Munro (respondents) gave in defences, and pleaded, 1, That the pursuer having been born illegitimate in England, of an English mother, was not entitled to succeed in a declarator of legitimacy founded upon the subsequent marriage of the alleged parents in England; 2, That upon the supposition that the domicile of Sir Hugh Munro at the period of the pursuer's birth and her mother's marriage were material, that domicile must be held to have been English.

The Lord Ordinary (23d January 1833) allowed to both parties a proof of facts and circumstances, in so

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far as the same tended to instruct the domicile of Sir Hugh Munro. Some of the numerous facts and circumstances adduced in evidence by the parties are subjoined.[1] The material parts of the evidence on the

[1] Early in 1794 Sir Hugh accompanied Dr. Robertson, the clergyman of his parish, to London. In writing to his factor he says, in reference to his return, that it would be in June or July 1794; and in another letter in the same year he says, "At Whitsunday next I "intend taking the management of the estate into my own hands. "Mr. Munro (his law agent in the country) will continue to act for "me until my return to the country, which will be early in summer;" and in that year some furniture, such as clothes presses, &c., was ordered and provided for his own dressing-room in the castle. On the 3d September he wrote to the Lord Lieutenant of Ross-shire, "I shall be very happy to act as your deputy-lieutenant in the district "you mention." In 1795, in his correspondence, he gave directions about the preservation of the lawn of Fowlis Castle from tillage. In September of that year he wrote to his country agent to defer a final settlement "until my own return to Ross-shire, which will be very early "in next summer;" and in a letter about the same time to his factor he says, "At Whitsunday next I intend taking the management of the "estate entirely into my own hands. From that date I shall be my own "factor; an office which I expect, with your assistance, to be able to "execute with more benefit to myself and more real advantage to the "tenants than it has ever yet been;" and in another letter he says, "I "embrace this opportunity of informing you that though I propose being "my own factor, I shall, both in Ross-shire and here, refer the manage-"ment of the estate to you;" and again, "When in the country, as I "wrote you, I shall consider my factor under your directions; when I "am here you will be factor under mine." In November of that year, "in writing to his factor, he says, "From the 20th January 1796 I com-"mence the management of my own affairs, and shall not trouble you to "collect the arrears." In February 1796 he writes to his factor, "The "accounts may now very properly be deferred until my return to Ross-"shire." Sir Hugh at first, on coming to town, lived in lodgings, but in the month of March 1796 took a house in Gloucester Place, London, on lease for seven, fourteen, or twenty-one years, in the lessee's option, and having furnished it went to reside there with the appellant's mother. On the 25th March 1796 he writes to his factor, "The appearance of the "lawn under corn would often disgust me, especially should I live in the "house, (which you know is what I intend, and to have myself supplied "by the tenant in corn, straw, &c. &c.)" In a lease, granted 14th May 1796, of the mains and lawn of Fowlis for seven years, with a break at the end of three, a provision was inserted against ploughing the lawn; and at this time also he directed a cow to be bought for his accommodation. On the 16th May 1796, in a letter to Mr. Kenneth M'Kenzie,

question of Sir Hugh's domicile are stated and commented on in the opinions delivered by the Lord

W. S., his solicitor in Edinburgh, he asked, "What forms, if any, are "necessary to be observed when executing a will, testament, or dis- "position for the disposal of personal property? and whether, by a gene- "ral disposition, land also may not be conveyed." In a letter of the 26th May Sir Hugh alluded to his return to Scotland in July or August, but in October he wrote that unforseen events having obliged him "to "defer his journey," he would be in Ross-shire next year. On the 27th October he thus writes to his factor: "The hens and eggs now paid "in kind are to continue to be so; it is easy, during my absence from the "country, to dispose of them at a price equal to the conversion in the rental, "and when at home I shall have occasion for them." In March 1797 Sir "Hugh wrote to his factor, "I shall be very soon in Ross-shire, and the "mill is not to work after Whitsunday before my return to Ross-shire;" and in July he wrote, "I set out in a few days for Edinburgh. Such "letters as you may have occasion to write me after receipt of this are to "be addressed to me, under cover to Kenneth Mackenzie, Esquire, "writer to the signet." On the 18th October he wrote to Mr. Mackenzie, "My stay in the country will be about six weeks, or to the end "of December at the very latest." Addressing the Lord Lieutenant of the county on his elevation to the peerage he says, 24th October, "Expecting every day to be able to pay my respects to your Lordship "in Ross-shire." In November he wrote, "My journey to Ross-shire, "so long and often retarded here by circumstances which I could not "foresee, is now, by the advice of friends here, given up till next "summer." In 1798 he wrote to his factor, 28th March, "I expect "very soon to be able to write to him (Dr. Robertson) the time at which "I propose myself the pleasure of seeing him;" and on 2d May 1798 he says, "I shall be obliged to you to view the house and farm-offices "at Fowlis, the pipes, wells, drains, sunk fences, &c., and inform me of "such repairs as you shall deem absolutely necessary." In 1799 advantage was taken of a break in the lease of the mains, and one of the tenants deponed that the reason given was, that Sir Hugh was coming to reside at Fowlis, and therefore wished to have the mains in his own hands. During that year, and also in 1800, he ordered improvements and repairs in the castle, and transmitted furniture from London; and in the beginning of summer 1801 he writes, inquiring about the height of the rooms, and other particulars. On the 9th December he wrote to his factor to know "the length and breadth of the bedstead in my room;" and on the 16th, that "it is my resolution, please God, to go early next summer "into Scotland. I wish, if possible, to reside at Fowlis while I am in "that country, and I hope I shall, without difficulty, be able to accom- "plish my wish; but be that as it may, nothing but death or violent "sickness shall prevent my affording you an opportunity of seeing me." On the 20th January 1802 he wrote to Mr. Kenneth Mackenzie, "I inti- "mated to him (his factor) in general terms (on the 16th December),

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Chancellor and Lord Brougham in deciding this and the preceding cause of Countess of Dalhousie v. M'Douall. See post, p. 600.

The Lord Ordinary appointed parties to prepare cases on the import of the proof, with which he made

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" that your very short stay in Fernidonald, (the district of country in " which Fowlis Castle is situated) not having permitted you to obtain " all that information on his wood accounts which I deemed necessary, " that I was obliged to defer the final settlement of them until next " summer, when it was my intention to meet him in Ross-shire; that, " therefore, in his factory accounts for 1800," &c. In the same letter he added, " I am anxious during my visit to Ross-shire, which must be very " short, to avoid business as much as I possibly can; and I expect I " shall be able, with your assistance, (which I again solicit,) so to arrange " matters with Aitkin, &c., as to leave nothing for discussion while " there. I have long been among the Benedicts; but meikle man as the " Laird of Fowlis may be among his own fir trees, he is but a little man " in London, and therefore I did not deem it necessary to publish my " marriage; my intended visit to Ross-shire made it, I thought, proper.', On the 25th April he writes to Mr. Aitkin (his factor), " Accounts for " 1799, and the first copy for those of 1800, may now be returned me in " course of post. I have resolved to be at Fowlis as soon as the house, " which is painting and repairing, can be inhabited; but as these things " do not depend on my wishes I cannot fix positively any time. I hope " to be in Edinburgh in July or August. I shall probably have some " few inquiries to make between this time and that; and I take this " opportunity of apologizing for any trouble which they may occasion " you. I consider a journey to Ross-shire and a residence in that coun- " try as likely to involve me in much more trouble than would the tour " of the French Republic." In the beginning of 1802 several ship- ments of furniture were sent from London to Fowlis. On 6th Septem- ber 1802 Sir Hugh wrote to his factor, " The fine season now almost past " makes me wish we were set out on our journey, and I hope it will not " be many days before I am able to fix that of our departure hence. I " shall depend entirely on the Inverness market for what little liquor I " may require, and in a few days I shall trouble you with a note of what " wines, &c. I may wish should be lodged at Fowlis previous to our " arrival." He accordingly ordered twelve dozen of wines and three gallons of spirits to be got from Inverness. The first break in the lease of the house in Gloucester Place occurred at Christmas 1802. Sir Hugh did not avail himself of it; one domestic was left in charge of the house, the others accompanied Sir Hugh to Scotland; the parish rates continued to be paid as for an occupied house. After reaching Scotland Sir Hugh appealed against an assessment on Fowlis Castle, on the ground that it was not inhabited or furnished prior to November 1802.

avizandum, and afterwards (4th December 1834) appointed the parties "to prepare additional mutual cases "on the remaining points of the cause." Both parties lodged additional cases, upon advising which (12th May 1835), the Lord Ordinary reported the cause to the Lords of the First Division, and issued a note in the terms subjoined.[1]

Statement.

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[1] "*Note.*—The Lord Ordinary has reported this case, because it may "involve various questions of international law of great importance and "difficulty, which have been much agitated of late both in this country "and in England, but which cannot yet be considered as settled on any "certain foundation. These questions of law may possibly be superseded by a question more properly of fact or evidence, namely, the "domicile of Sir Hugh Munro at his daughter's birth and his own "marriage; for, if it shall be held that at both those periods he was "domiciled in England, it seems clear that the defenders must be "assoilzied from the conclusions of this declarator. That question of "evidence is not fit for the consideration of a jury, because it is mixed "up with many points of law of a delicate and complicated nature, and "therefore it is also reported to the Court. At first the Lord Ordinary "thought that the most convenient mode of proceeding was to take up "the question of domicile separately as of a prejudicial nature; and "therefore by his first interlocutor he ordered cases on that point alone. "But on reconsideration it appeared that a hardship might in consequence be imposed upon the pursuer by dividing the cause, and "exposing her to the risk of two appeals; and there is no case in which "dispatch is more desirable than in a question of status, on which "rights, both personal and patrimonial, of the greatest importance, may "depend.

"With regard to the question of domicile, the issue seems to turn "upon the point, where Sir Hugh Munro was domiciled at the time of "his marriage with the pursuer's mother? The defenders have argued, "on the strength of certain dicta in English cases, that the status affixed "by birth in a case of this nature is indelible, although the parents "afterwards take up their abode and are married in a country where "legitimation per subsequens matrimonium is admitted. On principle, "as well as on the highest authorities, it is thought that this proposition "is not maintainable. But there is no occasion to enter upon it here, "because it is clear from the evidence that Sir Hugh's domicile, whether it shall be held to have been in England or in Scotland, was the "same at the date of the pursuer's birth and of his marriage with her "mother.

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The First Division, upon advising the record and cases, pronounced this interlocutor (12th January 1836):

"Assuming his domicile at both these periods to have been in Scotland, it is beyond doubt that the mere fact of the celebration of the marriage in England is immaterial; for it is a general rule, that all contracts shall have reference to the place where they are to be implemented; and this is more especially the case as to marriage, by which the status of the parties and their offspring is to be determined. On this point Huber, Hertius, and all the more recent jurists of name are agreed.

"The Lord Ordinary has bestowed much consideration on the evidence; but having reported the cause, he forbears to express an opinion upon its import. Either view presents difficulties, to some of which he will very shortly advert.

"Scotland was Sir Hugh Munro's domicile of origin, and it is clear that he retained that domicile until his education was finished, and till he returned in 1789 from his tour on the continent. Absence from home by a youth for the purpose of education or the benefit of foreign travel is the example commonly given, in which a change of residence confessedly does not operate a change of domicile; and the case is the same whether the party is a minor or sui juris.

"From 1789 till the beginning of 1794 Sir Hugh lived with his mother at Ardullie in Ross-shire. The house was his property, but he had no establishment there distinct from that of his mother. It appears that she had a right to occupy the house, but on what footing is not explained. Her son during this period, therefore, must be held to have been her guest or lodger. But as his domicile was originally Scotch, and as he had done nothing to alter it during his stay with his mother, he continued a domiciled Scotchman.

"In 1794 a misunderstanding arose between Lady Fowlis and him on account of her refusing to give up Ardullie, and he went to London to reside. It does not appear that he left servants, horses, or any other part of an establishment at Ardullie, and he had never lived at Fowlis Castle, the mansion-house of his estate: indeed, it was at that time unfit to be inhabited. After being in lodgings in Dover Street for some months, he obtained a lease of a house in Gloucester Place for a period of seven, fourteen, or twenty-one years from Christmas 1795, at the pleasure of the lessee; and at the same time he granted a lease of the mains or home farm of Fowlis Castle, with the exception of the inner lawn, for seven years, with a power to resume at the end of three years. He did not resume possession, but renewed the lease.

"From 1794 till September 1801, the date of his marriage, it does not appear that he was ever in Scotland.

"It is said by the defenders, that these circumstances indicate an English domicile at the periods in question,—1st, because they show

—"Of consent of both counsel, allow the supplementary "cases to be withdrawn, and appoint the parties, on the

"that London was then Sir Hugh's ordinary abode, and they afford no "grounds to conclude that he intended to leave it at any given time; "and, 2dly, because he had no place of residence or establishment in "Scotland, having removed from his mother's house, and Fowlis Castle, "as is proved by a letter under his hand, being until the year 1802 "neither inhabited nor habitable. This, therefore, is not a competition "between two residences, each of which was occupied in its turn, as in "the case of Lord Sommerville, but between a domicile arising from "the sole residence of a party sui juris for a period of six years and the "forum originis, which without residence, or some other qualified cir-"cumstance, is of no avail.

"Farther, many of the circumstances on which the pursuer relies "seem of little weight. Sir Hugh inherited a landed estate in Scot-"land, and he increased it by a purchase of land in the neighbourhood. "But in the cases[1] of the Earl of Strathmore and of Ross the situation "of the party's estate was held immaterial. As little stress can be laid "on the fact that Sir Hugh took a lively interest in his Scotch pro-"perty, and gave minute directions as to its management. He sold his "estate in England, but that was the result of a transaction of his guar-"dians while he was yet under age; and it does not appear that that "estate was ever contemplated by his father any more than by himself "as a place of residence. It is equally unimportant that he occasionally "acted as a magistrate in Ross-shire, attended public meetings, and "voted at elections, before his removal to London in 1794, and after his "return in 1802, not only because those acts do not fall within the "period in question, but because they naturally or frequently result "from a connection with landed property altogether independent of "domicile. It was so laid down in the House of Lords in both the "cases which have just been mentioned. There are instances given in "the proof of Sir Hugh sending furniture and wine to Fowlis Castle "during this period; but this might have been done though he meditated "only occasional and short visits to Scotland, such as repeatedly occurred "in the cases of Lord Strathmore and Ross.

"But there is one circumstance of very great weight in favour of the "pursuer's claim, namely, that Sir Hugh did remove to Scotland after "his marriage in September 1801, and resided there exclusively for "many years. For, although his domicile after his marriage is im-"material in itself, it may afford evidence of what his views and intentions "were during the preceding period of his life. Accordingly, it is ably "founded on in the pursuer's case, to show that, although it was not "convenient for him to put Fowlis Castle in repair or to furnish it, he

[1] See post, p. 586.

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"first box-day in the ensuing spring vacation, to put in "mutual additional cases on the question of legitimacy; "said cases to be revised, printed, and boxed, along "with the other printed papers in the cause, to the "whole Court, with a view of obtaining the opinion "of the Lords of the Second Division and of the "permanent Lords Ordinary on the questions therein "argued."

The printed papers were thereafter submitted to the other Judges, and the following opinions, in writing, were returned.

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Lords Justice Clerk (Boyle), Meadowbank, Fullerton, Jeffrey, and Cuninghame.—"We are of opinion that "the pursuer has not established her right to the "character of the legitimate daughter of Sir Hugh "Munro of Fowlis, and that the defenders are there-"fore entitled to be assoilzied from this action.

"We are of this opinion, because we are satisfied "that Sir Hugh was truly domiciled in England both "at the birth of the pursuer in 1796 and when, in "September 1801, he there married her mother, who "had never had any other domicile. We do not think "it necessary to consider how the case of the pursuer

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"had always regarded Gloucester Place as a temporary abode, or a "lodging to be occupied when, like other young men of fortune, he "resorted to the metropolis; yet he never lost sight of his paternal "mansion as his proper and only home, resorting to it permanently as "soon as his status was fixed by marriage.

"What effect is to be given to a suggestion of the defenders, that Sir "Hugh might have been induced to return to Scotland with a view to "legitimate the pursuer, is left for the consideration of the Court. The "Lord Ordinary can discover no trace of evidence that he was influenced "by that motive."

"might have been affected by the English domicile of "the mother alone, taken along with the fact that she "herself was born in that part of the United Kingdom, "and that it was the place where the marriage was "subsequently celebrated, and where all parties conti- "nued to reside for upwards of a year after that mar- "riage,—if Sir Hugh himself had, up to the time of "the marriage, been incontestably a domiciled Scotch- "man. Even upon this supposition, however, we think "the pursuer must have had difficulties to encounter, "which have not yet been resolved by any clear autho- "rity in the law of either country. Some of the dicta "in the ultimate decision of the cases[1] of Sheddan, "Strathmore, and Ross seem to point to a conclusion "against her; while others, of the very highest autho- "rity, in the more recent case[1] of Sir George Warren- "der, have rather a contrary bearing. But holding, "as we do, that the domicile of the husband was also "English, we humbly conceive that there is no authority "on which the claim of the pursuer can be supported.

"We do not think it clear, that at the time of the "marriage Scotland was exclusively or immediately "contemplated as the future home of the parties, or "the country in which their conjugal rights and duties "were to be claimed and performed, though we rather "incline to think that it should be so held. But then "we are of opinion that this is a consideration truly "irrelevant and extrinsic to the present question. The "law of the country to which the contracting parties "looked at entering into the contract, and in which

[1] See post, p. 585.

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"they intended that it should be carried into execution, "may very properly be referred to (in preference to "that of the place of celebration, and perhaps even of "domicile) for the measure of their rights and obliga- "tions; because these, and no others, were truly the "rights and obligations for which they must be held in "substance to have mutually stipulated and engaged. "But the legitimation of their previous offspring is not "a matter for which they could contract or stipulate, "or which can now be given or withheld according to "what might be proved or inferred as to their purposes "or understanding. It is, on the contrary, the gift or "legal result of the law, as applicable to certain facts "and circumstances; the value and effect of which must "be judged of by the law alone, independent altogether "of the intentions or expectations of the parents. The "law, therefore, under which they themselves intended "to live as married persons, may very well be allowed "to settle the extent of their rights and duties as with "each other, but cannot affect the condition of children "previously born, which we think must be determined "by the law of the country where the parents were "domiciled at the birth and the marriage. If the "domicile was not the same for both parents at these "two periods, we should hold that that of the father "at the time of the marriage should give the rule. "But as they were the same in this case, the question "does not arise.

"From what has now been said, it will be under- "stood that we do not adopt the doctrine maintained "in some parts of the defender's case, as to the absolute "indelibility of the bastardy which attaches to a child

" born under any circumstances out of lawful wed-
" lock in England. Expressions calculated to coun-
" tenance such a doctrine appear, no doubt, to have
" been used by some of the noble and learned persons
" who disposed of the cases of Sheddan and Strathmore
" in the House of Lords.[1] But as in both these cases
" the domicile of both parents, as well as the place of
" marriage and the after home of all the parties, was
" indisputably within the territory of the law of Eng-
" land, we cannot but consider them as having been
" used with reference to those admitted circumstances,
" and as truly importing no more than that the law to
" which alone the parents were subject at the time of
" the birth and of the marriage must then have attached
" upon the child, and fixed its condition as a bastard so
" irrevocably as to admit of no change by any subse-
" quent acquisition either of domicile or of patrimonial
" interest in another country. To this extent we con-
" ceive these decisions to be of binding authority; and
" the opinion we have expressed is in entire conformity
" to them. But we do not think they went farther;
" and we accordingly observe, that in the last case in
" which a question of this kind was submitted to the
" Court of Review, we mean that of Ross of Cromarty,
" the Lord Chancellor (Lyndhurst), in moving the
" judgment of the Lords against the legitimacy of the
" claimant, expressly declined giving any opinion on
" the general indelibility of an English bastardy, and
" rested his judgment entirely on the English domicile
" of both the parents at the period of the marriage.

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" We have understood also, that the Lord Chancellor " (Eldon) maintained the same reserve in the earlier " case of Strathmore, and gave his opinion against the " legitimacy on the English domicile and marriage " alone; while, in the case of Sheddan, those decisive " circumstances were combined with the additional dis- " qualification of alienage on the part of the claimant. " In short, while there has confessedly been no judg- " ment any where denying the right of legitimation " per subsequens matrimonium to the children of Scot- " tish parents, having no other than a Scottish domicile " at the time either of the birth or the subsequent mar- " riage, on the single ground of those children or some " of them happening to be born during an occasional " visit of the mother in England, we must hold that it " cannot have been intended to prejudge such a ques- " tion by any dicta delivered in cases where it was not " raised or argued, and that whenever it is so raised it " will be dealt with at all events as an open question.

" As to the evidence upon which we have felt our- " selves constrained to hold that Sir Hugh Munro was " a domiciled Englishman at and previous to his mar- " riage with the mother of the pursuer in September " 1801, we do not think it necessary to go into any " details. On the whole, it appears to us clear that in " 1794 Sir Hugh removed his residence to London " with a view to a long and settled, though indefinite, " abode; and that in the course of that residence he " had lost his former Scottish domicile and acquired a " new one in England, long before the period of his " marriage in 1801. He had lived by that time more " than seven years continuously in the metropolis. In

" 1795, a year before the birth of the pursuer, he " had taken the lease of a house there for a period of " twenty-one years, with a break at the end of seven " years, of which he did not avail himself. He had all " this time no adequately furnished house for his accom- " modation and no domestic establishment in Scotland; " and in 1795 he had let the mains or home farm " around his Scottish castle for seven years, with a " power, which he did not exercise, of resuming it at " the end of three.

" We are not of opinion that the ultimate judgment " in the case of Lord Sommerville [1] affords any coun- " tenance to the notion that Sir Hugh Munro never " lost his Scottish domicile. The question in that case " was, where Lord Sommerville was domiciled at the " period of his death? And the state of the fact being, " that for many years previous to that event he had " an establishment and domestic residence in both " countries, and divided his time pretty equally between " them, it was held reasonable to infer that the original " domicile of nativity, which could not be lost by mere " absence from Scotland on public employment, was " that which he preferred and meant to perpetuate " during this period of voluntary but divided residence. " The question here, however, is not, where Sir Hugh " was domiciled at his death, or when he regained that " of his nativity after his return to Scotland in 1802, " but what was his domicile at the time of the pursuer's " birth and his marriage with her mother?

" We cannot think that a settled voluntary residence " for upwards of seven years in one and the same

[1] See post, p. 593.

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" house in London, held on a lease entered into at the " very beginning of such residence, can be barred of its " natural effect of establishing an English domicile for " the resident by such expressions as occur during this " period in the correspondence of Sir Hugh. It is no " doubt true, as the pursuer observes, that he appears " always to have cherished the notion of one day return- " ing and taking up his abode in his paternal mansion; " and that he made some small preparations from time " to time for such an ultimate return; but all this we " humbly conceive indicates an intention not to retain " his original domicile, which, as to a man sui juris, " requires residence as well as purpose, but merely to " regain or reassume it at some future period, when the " objects of his long voluntary residence in England " were attained, and he was ready to throw off and " resign the intermediate English domicile he had con- " sequently acquired. Men settling themselves of their " own accord or in the Company's service in India " are held beyond all doubt to lose their native and to " acquire an Indian domicile; and the cases are innu- " merable in which their intestate succession has been " distributed upon this assumption accordingly. Yet " there probably is not one of those persons, especially " of Scottish origin, who has not meditated an ultimate " return to his native land, and in the great majority of " instances made great preparations and outlays with a " view to it. All this, however, only indicates a pur- " pose to change their actual Indian for a future Scot- " tish domicile; and till this purpose is consummated by " their actual return to Scotland animo remanendi, it " is quite settled that their only domicile is in India, " and that it is by the law of that country that their

" rights and condition must be exclusively regulated. " If Sir Hugh Munro had died in London the day " or the year after his marriage, it does not appear to " us to be doubtful that his moveable succession ab " intestato must have been regulated by the law of " England, and, if he was clearly a domiciled English- " man to this effect, we cannot possibly doubt that " he was also in regard to the marriage itself and its " consequences."

Lords Glenlee, Medwyn, Moncreiff, and Cockburn.— " This is a case of great interest to the parties. We " also think it of importance to the law, and we have " accordingly considered it carefully.

" Though the case raised by the declaratory conclu- " sions of the summons is generally upon the personal " status of the pursuer as maintaining herself to be the " legitimate daughter of her father Sir Hugh Munro, it " appears from the form and scope of the summons, and " more especially from the character and position as- " sumed by the defender, that the substantial question " raised between these parties relates to the eventual " succession to the estate of Fowlis in Scotland under " the entail of that estate. The parties in reality join " issue in the question, which of them is at this moment " the presumptive heir of entail?

" Although, therefore, the quæstio statûs to be deter- " mined must be governed by the principles of general " law applicable to all such questions, it is not unim- " portant to keep it in view, that, as that question arises " with a precise relation to the rights of succession to a " landed estate situated in Scotland, it is by the law of " Scotland peculiarly that it must be tried and decided. " The pursuer, in asking it to be declared that she is

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" the legitimate daughter of her father, and as such the " heiress presumptive of entail in the estate of Fowlis, " says, and necessarily must say, that she is thus legiti- " mate according to the rules of the law of Scotland, as " laid down by the authorities in that law and the de- " cisions of the courts having jurisdiction to administer " it. And the defender, in appearing to resist the pur- " suer's demand, and maintaining that she is not legiti- " mate, and therefore that he is the heir presumptive in " the estate of Fowlis, says, and must say, that the " pursuer's illegitimacy and his own consequent right " can be determined only by the law of Scotland.

" We do not mean by this observation to imply, that " facts occurring in other countries, and the laws of " those other countries incidentally operating on those " facts, may not be necessary or material for con- " sideration in resolving the question of status put in " issue. But, as the question raised directly relates to " the succession to an heritable estate in Scotland, and " as the laws of all civilized nations hold that every " such question must be determined by the courts and " the law of the state where the property is situated, all " such facts, and all such applications of the law of " other states, must be judged of with reference to the " fundamental principles of the law of Scotland itself.

" It is an admitted and essential fact in this case, " that the pursuer is the daughter of Sir Hugh Munro " and of Jane Law, who, at the time of her death at " Fowlis, on the 3d of August 1803, was the lawful " married wife of the pursuer's father; and, whatever " other questions may exist concerning the legal domi- " cile of those parties at other periods of their lives, it " is beyond all doubt certain that they were at that

" time, and long before, to all intents and purposes " domiciled in the Castle of Fowlis. If at that time " Sir Hugh had predeceased Lady Munro, assuredly " she would have had all the rights of the widow of a " domiciled Scotch gentleman, and the succession to " his estates real and personal would have been regu- " lated generally by the law of Scotland.

" It has been an established rule and principle of the " law of Scotland for some centuries that, when a man " and a woman are once lawfully married, all the " children born of such parents, whether born before " the public celebration or open declaration of such " marriage or after it, are equally to be esteemed their " legitimate children. It is perhaps not very necessary " to inquire minutely into the principles on which this " rule of law has been established in Scotland, as it has " also been in most of the countries of Europe. It is " generally stated by our authorities to rest on a pre- " sumption or fiction, by which it is held that there was " from the beginning of the intercourse of the parties, " or at the time when the child was begotten, a consent " to matrimonial union interposed, notwithstanding " that the contract was not formally completed or " avowed to the world till a later period; and it has " been thought to be recommended by these considera- " tions of equity and expediency, that it tends to encou- " rage the conversion of what is at first irregular and " injurious to society into the honourable relation of " lawful matrimony, and that it prevents those un- " seemly disorders in families which are produced " where the elder-born children of the same parents " are left under the stain of bastardy, and the younger " enjoy the status of legitimacy.

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"But, whatever may be the principle, and whether "the law may be useful or the reverse, it is undoubt- "edly settled in the law of Scotland. It is indeed "liable to some exceptions. If, at the time when the "child was begotten one or both of the parties were so "situated that they could not lawfully contract marriage "the presumption is excluded, and legitimation cannot "take place. And in like manner questions have been "discussed as to the effect of facts, intervening between "the conception or birth of the child and the marriage, "inconsistent with the retroactive power of the mar- "riage at last established. We think it unnecessary to "enter into such discussions farther than to observe, "that we do not doubt that the presumption may be "contradicted and the operation of the law excluded "by any thing which renders it impossible that the "principle of it could be applied. But, apart from all "such peculiarities, the rule is clear, and is of such "strength and power that, as Craig states it, 'tanta "'enim vis est matrimonii subsequentis ut de priori "'delicto inquiri non sinat, et illud omnino tollat et "'purget.'" Cr. ii. 13. 16.

"Though this doctrine is not to be taken so abso- "lutely as that nothing whatever in the history of the "parents, or connected with the birth of the child, can "be inquired into or considered to control the effect "of the state of matrimony at last established, the pre- "sumption arising from it is at least so strong that, in "a case standing in the first instance on such indisput- "able facts as those which we have hitherto assumed, "it must lie with those who deny effect to the acknow- "ledged law to show some clear ground of exception, "—some distinct and specific cause or impediment,

" proved in fact and laid down as relevant on sufficient " authority, in respect of which a child of parents lawfully married shall be held illegitimate.

" And we do think it of great importance to observe, " that, whatever judgment may be ultimately formed " on the particular grounds of exception maintained in " the present cause, no case has yet been decided — " certainly none in the law of Scotland — against the " legitimacy, in which the same state of facts existed at " the dissolution of the marriage. In the case of Shed- " dan v. Patrick [1] the parties were throughout and to " the end domiciled in America; in Rose v. Ross [1] they " were all effectually domiciled in England, which legal " condition was held not to be altered by the run made " into Scotland for a few weeks; in the case of Strath- " more [1], though a struggle was made for a Scotch domi- " cile, Lord Strathmore, dying one day after celebrating " a marriage with an Englishwoman in London, was " held to have lived and died domiciled in England. " However the judgments pronounced or the dicta " delivered in these cases may bear on the present case " otherwise, it stands very differently from them all in " the point to which we are now referring. Sir Hugh " Munro and Lady Munro were, during a long period " of time, truly and bonâ fide domiciled as married " persons at Fowlis in the county of Ross animo rema- " nendi, when, by unforeseen calamity, the marriage was " dissolved by the death of the lady. The status of " their daughter, certainly acknowledged and treated " by them as their lawful daughter, was then to be " determined under the force of the laws of Scotland.

[1] See post, p. 586.

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"If Sir Hugh had died at the same moment there "could have been no conflictus legum in the direct or "proper sense. Dying the proprietor of a Scotch "entailed estate and a native and domiciled Scotchman "in the castle of his ancestors, having no real property "anywhere else, he must have left his succession, "equally in heritage and in personal estate, to be ruled "by the law of the country where he drew his first and "his last breath, and had held through life the centre "of his affairs. If his wife had survived him her status "and consequent rights must have been at once estab- "lished by her undoubted possession of that status, and "the open cohabitation of the parties as husband and "wife, without necessity for any inquiry into the time, "place, or manner in which any formal celebration of "marriage had taken place between them. There was "here no disguised or colourable proceeding. The "domiciliation in the place undoubtedly most suitable "for the proprietor of such an estate, and the chief of "such a family, was fair, honest, and real in all "respects; and the question which thus arises in the "front of the case is one which has not occurred in any "of the other agitated cases, — whether the rule of the "law of Scotland, which holds all the children of "married persons to be legitimate, will admit of being "controverted, by inquiry into the circumstances of the "child's birth, or the local residence of the parents at "the time when they either celebrated a form of mar- "riage or legally declared themselves to be married "persons? We do not say, that it has been positively "decided that such inquiry is inadmissible, though the "text in Craig comes very near to that point. But at "least we know of no case in which the same facts

" have occurred, except indeed the depending case of " M'Douall of Logan, in which a great majority of the " Court hold the legitimacy to be established.

" Although, therefore, the present cause involves " other questions of great delicacy and importance, " and though we are sensible that it cannot be ex- " hausted, and will not be generally thought to admit " of being decided on this ground alone, we still think " it of importance that the peculiar circumstances " under which the legal presumption is in this case " sought to be overcome should be kept in view.

" The defender has put on record two pleas, in " respect of which he maintains that the law which " establishes a child's legitimacy by the marriage of its " parents is excluded in this case. These pleas are,— " ' 1st. The pursuer, having been born illegitimate in " ' England of an English mother, is not entitled to " ' succeed in a declarator of legitimacy, founded upon " ' the subsequent marriage of her alleged parents in " ' England.

" ' 2d. Upon the supposition that the domicile of " ' Sir Hugh Munro at the period of the pursuer's " ' birth and her mother's marriage were material, " ' that domicile must be held to have been English.'

" These pleas are, no doubt, skilfully drawn as the " pleading of a party; but they are not expressed " with the precision which we think necessary for judg- " ment. The first combines and blends two points " together which are in themselves distinct. It cannot " be gathered from it, whether it is meant to be laid " down that the pursuer must be legally illegitimate, " simply because her birth took place locally in Eng- " land before the marriage of her parents, though this " seems to be maintained in argument; or, whether it is

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" only intended, that a person so born in England " cannot become legitimate by a subsequent marriage " celebrated in England, leaving the question open " whether a Scotch marriage might not have that " effect. Again, it is made to appearance a necessary " element in the plea that the mother was English, " leaving an implication that the case might be diffe- " rent if the mother were a Scotchwoman. And still " farther, this first plea is stated abstractly, without " reference to the domiciliation of the father or mother. " On the other hand, the second plea states hypothe- " tically, that, supposing the domicile of Sir Hugh " Munro at the pursuer's birth and at her mother's " marriage to be material, that domicile must be held " to have been in England. It does not plead dis- " tinctly the precise effect ascribed to such domicile, " not indicating which of the two points of time is " taken as the ruling point; whether, if the place of " birth alone will not settle the question, the domicile " at the date of the birth will determine it; whether " there must be superadded to that the place of the " marriage and the domicile at the date of it; or " whether the place of the marriage alone, with the " domicile at the date of it, will admit or exclude " legitimacy; or whether, finally, the place of birth and " the place of marriage must be combined, and the " domicile at the date of marriage added to them.

" It is obvious that cases may be easily figured " coming within the scope of these pleas, in which the " application of them would be exceedingly perplex- " ing. The defender in his argument does not hold " himself to be bound to make out all the assumptions " on which they rest, but strives to sustain his case " by various hypotheses put forward alternatively. We

" think it of importance that the points should be " kept distinct. The first question, and in our opinion " by far the most important, is that which relates to the " domicile of Sir Hugh Munro. When that shall be " ascertained, it may then be applied to the birth and " to the marriage; and if it should be found that at " the date of the marriage he was domiciled in Scot- " land, it may then be a question, whether the locality " of the marriage can prevent the effect of it to render " the pursuer legitimate; or, if it should be found that " the locality of the marriage will not avail against the " law of the Scotch domicile, it may then be inquired " whether the place of the birth by itself or combined " with the place of the marriage will produce that " effect, assuming the domicile to have been Scotch at " the date of it. A separate question has been sug- " gested, though not distinctly in the pleas, on the " supposition that Sir Hugh Munro was a domiciled " Scotchman, as to the effect of the domicile of the " mother at the birth or before the marriage.

" We proceed to consider the question, what was " the legal domicile of Sir Hugh Munro at the time " of the pursuer's birth, and more particularly at the " time of the marriage of her parents. And we are of " opinion, upon a careful consideration of all the facts " of the case, that Sir Hugh Munro had at the first " his domicile of origin in Scotland, and that he had " not lost that domicile either at the date of the birth " or at the date of the marriage.

" We consider this to be a question of very grave " and serious magnitude; for, while it appears to us " that the facts do not warrant the conclusion that Sir " Hugh ever lost his Scotch domicile, according to the " fundamental principles of the law of domicile, we

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" apprehend that, upon the grounds on which it is " maintained that he did lose it, many individual " Scotchmen may be found to have lost their domicile " of origin, without any intention of abandoning it, or " the slightest contemplation of establishing a domicile " elsewhere, and so to have lived and died under the " operation of laws to which they never looked for " regulating the most important interests of themselves " and their families.

" Certain facts in the case appear to us to be free " from all doubt. Sir Harry Munro, the father of Sir " Hugh, was a native of Scotland, and undoubtedly " domiciled there all his life. Sir Hugh Munro was " born in Scotland, in 1763; he spent his infancy " and received part of his education in Scotland. He " was afterwards sent to England for education. His " father died in 1781, and Sir Hugh was in Scotland " that year. He afterwards went on foreign travel for " some years. He came of age in 1784, and was vari- " ously in England, Scotland, and on the Continent till " 1789, having been occasionally in Scotland in 1785, " 1786, and 1787; and having returned from the Conti- " nent in 1789, he came to reside with his mother in one " of the family mansions of the estate, and was constantly " resident there till 1794. We hold it to be quite an " indisputable matter of fact and law, that, down to " this period of his life, he had at all times and wherever " resident continued, as he was at first, a domiciled " Scotchman; for it is scarcely necessary to observe, " that a boy sent into England for education does not " lose his domicile of origin; and that neither does a " young gentleman, travelling into foreign parts for his " improvement, or living occasionally in the metropolis " of England for his amusement, make any change

" thereby on his legal status as a Scotchman. There is " no evidence, nor indeed any averment, that Sir Hugh " had in any part of this time established himself in any " permanent residence in England or elsewhere animo " remanendi: on the contrary, he had in the mean- " time sold the only real estate which he possessed in " England. His constant residence at Ardullie from " 1789 till 1794 would indeed have effectually fixed his " domicile at the end of that period. But the more " material view is, that then, at the age of thirty-one, " he had never ceased for a moment to be a domiciled " Scotchman. On this fundamental fact we apprehend " there can be no difference of opinion in the Court.

" So far as we discover from this record, Sir Hugh " Munro, being the heir of such a family, was not bred " to any profession. At any rate, having succeeded to " his father in 1781, he entered into no profession; and " it is clear from all the evidence in this cause that " throughout his life he never had any subject of care " or business other than the management of his estate " of Fowlis, the education of his daughter, and the " literary pursuits to which he might voluntarily addict " himself. The extent in which he engaged in the " active superintendence of the most minute affairs of " his estate is largely detailed in the evidence and com- " mented on by the parties. It is not of a common " nature, but appears to have gone far beyond the " ordinary attention of gentlemen of his rank and con- " dition to their estates. But though we think it of " very great importance, as marking his attachment to " his estate and to his native country, and his anxiety " for improving his paternal inheritance, manifestly in " contemplation of a permanent residence, we do not feel " it to be necessary to enter into the particulars so fully

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" brought out in the evidence and correspondence. " The important impression left is, that the legal pre- " sumption for the continuance of the domicile of origin " in all cases is in this instance greatly strengthened by " all the circumstances in the actings and proceedings " of Sir Hugh Munro. We can attach no importance " to the fact of some of the old furniture in the house " of Fowlis having been removed to Ardullie at an early " period, when it is observed that Sir Hugh's intention " then was to fix his residence at Ardully, at least for a " time, and it is besides apparent that from the nature " of Fowlis Castle, and the amount of debt left by his " father, that Sir Hugh was not in a situation either to " repair the house itself, or to furnish it in a manner " which he would have thought suitable. Such things " are far more than outweighed by his active care of " the estate during a constant residence of four or five " years after his return from travel, and the fact of his " having actually sold the only real estate which could " have connected him with England.

" Indeed, when we reflect on the condition of Sir " Hugh Munro at this time,—the proprietor of such an " estate, in which he took so deep an interest,—a gen- " tleman of rank and influence, and the acknowledged " chief of his clan, engaged in no profession, and " having no mercantile or other employments to draw " him away permanently, or to lead him to abandon " the land and domicile of his fathers and establish " himself in a foreign domicile animo remanendi, we " think that the improbability that any such intention " could enter into his mind is so very great that " nothing but the strongest and clearest evidence of the " fact could lead us to come to the conclusion that he " ever had such an intention.

" But in looking to what did take place in 1794 " and the following years, it is most essential to remember that the question is not, whether what Sir Hugh " did might have been sufficient to create for him an " English domicile for some purposes,—not, whether if " he had been a mere wanderer, with no previous fixed " domicile, whose domicile of origin was unknown, and " who had the sum of his fortunes and affairs centred " in no known locality of the earth; a person without " a home, or any fixed seat of his family interests, " family honours, family affections,—that which he did " in England might have stamped on him the character " of a domiciled Englishman? This is not at all the " case to be resolved. In the case of Lord Sommerville " it was clear, and was assumed as unquestionable, that " he had an English domicile fully established; but as " in a question of succession there can be but one " domicile to govern (and the rule is the same in a " quæstio statûs), the point to be determined was, not " whether he had an English domicile to some effects, " but whether he had deliberately abandoned and lost " his domicile of origin in Scotland as the predominant " guide in the succession to his property? And the " question is the same here, whether, holding it to " be clearly established that previous to Sir Hugh " Munro's departure from Fowlis in 1794 he was and " had never ceased to be a domiciled Scotchman, he " abandoned and lost that domicile, so as to render it " inoperative in any question of status which might " arise? To judge of this correctly, we apprehend " that it cannot be determined by any isolated facts, " but that all that he had done before, all that he did or " wrote during his residence in England, and all that

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" he did after the material point of time, must be taken " into view.

" For it is now necessary to advert to the leading " principles by which such a question must be governed. " One rule is, that a change of such a domicile once " established is not easily to be presumed:—' Non tamen " ' in dubio præsumenda facile domicilii mutatio; sic ut " ' eam alligans tanquam rem facti probare teneatur;' " Voet, 5. 1. 99. ' Sic enim in dubio in loco originis " ' et domicilio paterno quemque præsumi continuasse " ' domicilium jam ante dictum;' ibid. No. 97. And " on these principles as it is a settled rule in the con- " stitution of a domicile, that it is not formed or proved " by the mere fact of residence, however long conti- " nued, without the animus or purpose of permanent " domiciliation, much more (where the question is, " whether a man at the age of thirty-one has changed " his domicile, abandoning that which he had held from " his birth,) must there be proof, not only of the fact of " residence elsewhere for a given time, but of an inten- " tion to constitute a new domicile in exclusion of the " old. The question is one partly of fact, but still " more of intention; and unless both be proved, either " directly or as matter of necessary inference, the change " of domicile cannot be presumed to have taken place.

" It is on this clear principle that absence for edu- " cation, — absence on foreign travel, even though the " party may have lingered long in one spot, — absence " on military duty, however long, and with whatever " permanence in particular stations,—and various similar " cases, work no change of the original domicile. The " case of persons entering into the service of the East " India Company, or any similar employment, is essen-

" tially different; and let it not be thought that we " have lost sight of the settled rule in such a case. " Though the person who engages in such a course of " life may have in his mind a constant contemplation " of returning at some distant and undefined period " to his native country,—by adopting such a trade or " profession which indispensably requires a continued " residence in another, and actually pursuing it for a " length of time, he forms and evinces that animus " remanendi which is of the essence of a constituted " domicile; just as effectually as a man who settles as a " merchant in London or Hamburgh does, though he " may have a lingering anticipation that at some time " or other, when fortune has crowned his labour, he " may spend the evening of his days on his native soil. " Such cases, therefore, as Bruce [1], Dr. Munro [1], &c. " afford no illustration against the fixed principle, that, " to effect a change of domicile for questions of suc- " cession or status, there must be the combined force " of actual residence and the animus remanendi clearly " evinced. We think that the correct principles of " those cases have been imperfectly appreciated in the " opinions which differ from ours in the present case.'

" The case before the Court, and others of the same " kind, such as Sommerville, lie between the two classes " of cases now adverted to. There is neither, on the " one hand, a known ostensible object, such as edu- " cation, military duty, &c., which, by presumption of " fact and law, excludes the inference of a purpose to " abandon the domicile already held; nor, on the other " hand, any profession or metier of a permanent and " continuing nature taken up, which marks at once the

[1] See post, p. 600.

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" purpose of removal to another domicile animo rema-
" nendi. Still the principle of law must apply with
" equal force to such cases, that it is not by the fact
" of residence alone, but by such residence with the
" animus of permanency evinced that the abandonment
" of the original domicile is to be established; and this
" must ever depend on a due consideration of all the
" facts.

" The general principle on this subject cannot be
" better expressed than in the words of Voet, which
" correspond with all that is laid down by the other
" jurists:—' Illud certum est neque solo animo, neque
" ' destinatione patris familias, aut contestatione sola,
" ' sine re et facto, domicilium constitui: neque sola
" ' domus commoratione in aliqua regione, neque sola
" ' habitatione sine proposito illic perpetuo morandi,
" ' cum Ulpianus a domicilio habitationem distinguat,'
" &c. Voet, 5. 1. 98. And the general definition of
" a domicile, as the place where a man ' larem rerum-
" ' que ac fortunarum suarum summam constituit, unde
" ' rursus not sit discessurus,' si nihil avocet, undeque
" ' cum profectus est peregrinari videtur,' gives a test,
" whereby the question between mere habitation, or re-
" sidence de facto, and permanent domiciliation animo
" perpetuo morandi, may in most cases be easily
" resolved.

" With these principles in view, let the case of Sir
" Hugh Munro from 1794 downwards be considered.

" After having been for nearly five years constantly
" resident on his estate in the house of Ardullie, life-
" rented by his mother, he appears to have formed the
" desire of having an independent establishment. It is
" in evidence, that with this view, being then unable
" at once to repair and furnish Fowlis Castle, he had

" proposed to Lady Munro to remove to a house in " Edinburgh, and that she had at first agreed to the " proposal. This assuredly indicated no intention or " desire to forsake his domicile of Scotland, but directly " the reverse. Lady Munro, however, ultimately de- " clined the proposal. The consequence was, that a " certain degree of coolness was produced between Sir " Hugh and his mother. Whether this was the cause " of his going to London at that time is not precisely " in evidence, though it probably influenced him in " accompanying the Rev. Dr. Robertson, who had occa- " sion to go there; but it does appear that, intent on " his improvements, he lingered, and set out unwillingly " at the moment.

" There is nothing in the proof to show that in this " expedition Sir Hugh had any other object in view " than his amusement, and a natural desire to revisit " the metropolis; perhaps contemplating that he might " be able in the meantime to repair and furnish as " much of Fowlis Castle as might accomplish his pur- " pose of independent residence. In that very year, " 1794, some furniture was ordered and provided for " his own dressing-room in the castle; and it is in evi- " dence, that at that time there was no contemplation " of his being long or permanently absent, but, on the " contrary, a general expectation that he would return " soon, and that preparations were made for his recep- " tion in the following year, when furniture was sent " from Inverness specially for his own use. But appa- " rently the state of his health, or perhaps another " cause, prevented him from realizing his intention of " return at that time. Yet even then, in writing to his " factor, he speaks expressly of 'my own return to

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" ' Ross-shire, which will be very early in next sum-
" ' mer.' Again, he expressly intimates, that ' at Whit-
" ' sunday next I intend taking the management of the
" ' estate into my own hands.' ' Mr. Munro will con-
" ' tinue to act for me until my return to the country,
" ' which will be early in summer.' The same thing is
" said over and over again in other letters, where he
" uses the same words, and speaks expressly of what
" he is to do ' when resident in the country.' The
" letters early in 1796 bear the same words, Sir Hugh
" constantly speaking of his ' return ' to Ross-shire as
" for permanent residence. There is, besides, the
" clearest evidence of the reality of these intimations
" of his mind and intentions in the anxious directions
" which he gives as to the management of the lawn of
" Fowlis, declaring, in express words, that he ' intends
" ' to live in the house.'

" Though the ' return ' was postponed, and the same
" language is continued in the latter part of 1796 and
" the following year, we beg leave to stop here for a
" moment, and to ask these questions:—1. Whether,
" with such evidence before the Court, it can be held
" that when Sir Hugh left Ross-shire, in April 1794,
" he did so with the animus of abandoning his domicile
" in Scotland, or of fixing his residence in London
" animo remanendi? And, 2. Whether, in February
" 1796, when he was making such preparations, and
" writing such determinate intimations of his designs, it
" could, in any consistency with the truth of the case,
" have been predicated as a fact that he had fixed his
" abode and domicile in London animo remanendi?
" We cannot answer either of these questions otherwise
" than decidedly in the negative. And yet Sir Hugh

" had been then absent from Fowlis, and personally " resident in London for nearly two years. But we " think it clear that that residence, though inciden- " tally prolonged, was but the bare habitatio spoken " of by the authorities, ' sine proposito illic perpetuo " ' morandi.'

" Hitherto Sir Hugh had resided in hired lodgings. " We can probably see well enough the main cause " which almost from day to day protracted the execu- " tion of his fixed purpose of returning to Scotland. " He must have become acquainted with the pursuer's " mother at least as early as the beginning of August " 1795; probably some time before, as the pursuer was " born on the 15th May 1796; and although, as far as " there is faith in written and real evidence, where no " sinister design could be in view, neither this fact " nor the consequent pregnancy of the lady made any " change in Sir Hugh's mind or purpose, it is easy to " understand how from time to time he might be led " to delay the execution of it. There can be little " doubt that it was the consideration of her condition " which led to that transaction which forms the main " difficulty, and the main ground of the defender's plea " in this part of the case. In March 1796 Sir Hugh " took a lease of a house in Gloucester Place for seven, " fourteen, or twenty-one years, in the tenant's option, " in which he with the lady took up their residence.

" We are by no means insensible to the importance " of this fact; but we are far from thinking that it ought " to be regarded as conclusive of a permanent change " of domicile, or that it is not still to be considered in " connection with all the other facts of the case, in " order to discover the animus which prevailed through-

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" out. The form of the lease was only the common " form in general or frequent use in London; and it " is not a little remarkable that in the case of Lord " Sommerville he also 'took a lease of a house in Hen- " 'rietta Street, Cavendish Square, for twenty-one " 'years, determinable at the end of seven or fourteen " 'years;' and nevertheless it was found that his domi- " cile for succession was still in Scotland. The cases " may not be the same, in so far as Lord Sommerville " was in fact resident in Scotland during a part of each " year; but they are similar in this point, that the " mere taking of a house on lease is no conclusive proof " of an intention to change the existing domicile. All " the facts must still be looked into, and the real in- " tention ascertained, not by any single circumstance, " but by combining and comparing the whole together.

" Now, it was after having taken that lease that Sir " Hugh wrote the important letter to Mr. Aitken, of " the 25th March 1796, giving directions about the " lawn, and stating expressly his intention to live in " the house of Fowlis; which was followed by a lease, " in conformity to the instructions. By another letter, " of the 18th April 1796, he still intimated his intention " to be in Ross-shire that summer, and spoke of it as " his 'return' to the country; and it appears by other " documents that his return was expected and pre- " pared for. It is impossible that these things could " take place from any thing but a fair and true mean- " ing; for, if Sir Hugh had been then thinking of any " such question as that now before the Court, he had " an instant remedy in his hands, — he had only to " marry the pursuer's mother before the pursuer's birth. " Taking the letters, therefore, to speak the reality of

" his mind, we cannot doubt that he did still seriously
" intend a speedy return to Scotland.

" What may have been his precise view in taking the
" lease it may not be easy to ascertain. One simple
" probability is, that he wished to have the house, and
" could not get it without taking the lease for years.
" But supposing that he had other motives, we think
" that we are bound to adopt some hypothesis which is
" consistent with his declared intention otherwise; and
" there are various ways in which it may be explained,
" in perfect consistency with his firm resolution to re-
" turn to Fowlis, and to adhere to his Scotch domicile.
" He may have intended it as a suitable residence for
" the lady and his daughter, in which he might visit
" them occasionally, though he still settled his own
" residence in the castle of Fowlis. But take it other-
" wise, that he meant it to some effect as a residence
" for himself; what hinders the supposition that he
" intended the very thing which Lord Sommerville did,
" to keep it as a residence during a part of the year,
" while he yet carried into full execution his declared
" purpose of residing principally and permanently at
" Fowlis; or, still more probably, in this last view,
" that he contemplated his marriage, and an arrange-
" ment which might protect him against any appre-
" hended embarrassment? But whatever view he took
" of the lease so entered into, we think that it is clearly
" in evidence that it made no change on his purpose of
" residing at Fowlis. In that he appears to have been
" unshaken; and the delay to execute it must be attri-
" buted to other causes than any change of intention.

" But here we observe a very remarkable document.
" The pursuer was born on the 15th May 1796; and
" on the 16th May Sir Hugh, writing to Mr. Kenneth

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" Mackenzie on other matters, puts in this request:—
" 'I shall be obliged to you to inform me what forms,
" 'if any, are necessary to be observed when executing
" 'a will, testament, or disposition for the disposal of
" 'personal property, and whether by a general dispo-
" 'sition land also may not be conveyed.' This is at
" the very moment of the birth of the pursuer; and
" what does it import? Sir Hugh plainly contemplated
" the execution of some deed affecting his personal
" property, for the safety of the pursuer's mother and
" herself. Did he then imagine himself to be a domi-
" ciled Englishman? If he had so thought, he never
" would have been writing to a Scotch conveyancer for
" a form of settling personal estate. We are aware that
" it is not an impossible thing that a man may by his
" own acts become legally domiciled in a place, without
" his being perfectly in the knowledge of the legal fact.
" But that Sir Hugh Munro (who had held his domicile
" of origin untouched up to the moment of his leaving
" Fowlis in 1794, and, as we think, decidedly retained
" and adhered to it, as far as the constant intention of
" speedily returning could have that effect, till the very
" moment of so writing to Mr. Mackenzie,) should be
" held to have been domiciled in England animo rema-
" nendi, and to have deliberately abandoned his Scotch
" domicile, while he yet believed that all his estates,
" real and personal, were under the power of the law
" of Scotland, is a proposition which we find it very
" hard to receive.

" But farther, after this Sir Hugh went on, on the
" 25th May 1796, still to speak of his 'return' to the
" country, and to repeat the expression of this intention
" in July and August following. He changed his pur-
" pose of going in that year, but wrote, in October,

" that he should be in Ross-shire next year, ' unfore-
" ' seen events having obliged him to defer his journey.'
" And in a remarkable letter he instructed Mr. Aitken
" to reserve the hens and eggs paid in kind, because
" ' when at home I shall have occasion for them.'
" Where was Sir Hugh Munro's home at this time?
" At least, in his own mind, there was no doubt that
" his home was at Fowlis.

" Throughout the year 1797 Sir Hugh continues to
" speak of his return to Ross-shire. Various things
" were appointed to be done, and a box was sent to be
" placed in the library; and so fixed was his purpose
" that on the 14th July he writes,—' I set out in a few
" ' days for Edinburgh.' From some cause the journey
" was still delayed, but it was not laid aside. So late
" as the 24th October he intimates to the Lord Lieu-
" tenant, that he had expected every day to pay his
" respects to him; and though, when it came to the end
" of the season, he had limited his intention to a short
" residence, and was at last advised, on account of the
" state of the roads, to postpone it, yet there cannot be
" a doubt that throughout the correspondence he had
" never for a moment laid aside the intention of return-
" ing to Fowlis for permanent residence.

" The correspondence recovered in 1798 is not so
" full as in the previous years; but in March of that
" year Sir Hugh writes to Mr. Aitken, still expressing
" his intention of being in Ross-shire, and in May a
" very anxious letter about the observance of the con-
" ditions of the lease of the mains and the state of the
" house and offices at Fowlis, pipes, wells, &c., and the
" repairs necessary.

" In 1799 he writes anxiously about the repairs and

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" furnishings for the castle. In that year he took ad-
" vantage of a break in the lease of the mains; and
" one of the tenants depones, ' that the reason given
" ' for the break being taken advantage of in 1799 was,
" ' that Sir Hugh was coming to reside at Fowlis, and
" ' therefore wished to have the mains in his own
" ' hands.' The power had been reserved for that ex-
" press end, and now it was acted on accordingly.
" There is also very little correspondence in the year
" 1800. Sir Hugh was continuing to order repairs and
" improvements on the castle; and in one letter, in
" November of that year, though he still contemplates
" being in Ross-shire the next season, he anticipates the
" possibility of his being prevented.

" There can be very little doubt that what prevented
" Sir Hugh Munro from executing the intention so
" often declared of returning to Fowlis was, on the one
" hand, an unwillingness to leave the pursuer's mother
" and herself, and, on the other, a doubt or fear in what
" manner they might be received, especially by his own
" mother, when he should have fulfilled his intention
" of marrying the lady. But it seems to be very clear
" that, at least early in the summer of 1801, he had
" made up his mind to the course which he afterwards
" pursued; for we find him writing anxiously about the
" heights of the rooms and various minute particulars,
" implying the design of a speedy residence. By the
" proof it is established that during several years fur-
" niture had been gradually sent to the castle; and in
" the end of 1801 Sir Hugh writes in the most anxious
" terms on the subject of the thorough repair and
" furnishing of it.

" In the meantime the marriage between Sir Hugh

" and the pursuer's mother was celebrated on the 24th " September 1801. We cannot think it of any con- " sequence that Sir Hugh Munro is in the affidavit " designed by his actual residence in London, because " we believe that by the law of England all parties " before being married must have been resident in some " parish for a certain period, and that there are few " instances of a person married in London, however " clearly his domicile may be elsewhere, being other- " wise designed than by his actual residence there; " and as the parties were undoubtedly unmarried per- " sons previous to that celebration, neither can we " attach any importance to the fact that they are so " designed.

" But after having thus taken the first step, which " was to break through the state of hesitation which " had hitherto restrained him from completing his own " purpose of return, Sir Hugh's anxiety evidently be- " came intense to have the castle of Fowlis put in a " complete state for the residence, not of himself as " a single man, but of his wife and family, according " to his rank and station. On the 9th December 1801 " he writes to know 'the length and breadth of the " 'bedstead in my room;' and on the 16th he writes, " —'It is my resolution, please God, to go early next " 'summer into Scotland. I wish, if possible, to reside " 'at Fowlis while I am in that country, and I hope " 'I shall without difficulty be able to accomplish that " 'wish; but, be that as it may, nothing but death or " 'violent sickness shall prevent my affording you an " 'opportunity of seeing me.' We see here something " of the feeling of distress which Sir Hugh had expe- " rienced under the succession of incidents which had

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" interposed to delay that return to Fowlis which he " had constantly in his intention and desire, and some- " thing of the grave determination with which he looked " to it, now that the probable cause of its postponement " had been removed. Perhaps we see also some indi- " cation of what is more pointedly presented in another " important letter, written to Mr. Mackenzie on the " 20th January following. Sir Hugh apparently had " informed Mr. Mackenzie, among his other friends, of " his marriage, and Mr. Mackenzie had made some " remark about its not having been put in the news- " papers; and Sir Hugh, in answer, writes the remark- " able passage in which, observing that being but a " little man in London he did not think that necessary, " he adds,—' My intended visit to Ross-shire made it " ' (the marriage), I thought, proper.' There is here, " no doubt, and in a previous part of the letter, where " he speaks of his visit being short, a kind of prepara- " tion for a possible result, the fear of which was not " entirely out of his mind; namely, the possible reception " which his wife and daughter might meet with from " his mother especially and his other friends in Scot- " land, which might eventually render it necessary, for " his wife's comfort and respectability, after all to de- " part from that his natural and chosen residence. " That his real design was to settle there permanently " is proved by the extent of preparation made and the " successive ship-loads of handsome furniture sent to " Fowlis, but still more by the event, in their decided " and permanent domiciliation in the castle, when all " doubt on that point had been removed. But the " important fact established by the letter is, that the " marriage was entered into expressly in contemplation

" of the parties going to Scotland, as they actually did. " Sir Hugh had throughout looked forward to this, and " now he intimates to his confidential friend, that it was " distinctly with that object and design that the mar- " riage was celebrated. It was a marriage entered into " intuitu of the parties residing in the proper domicile " of the husband.

" There is another fact connected with this, stated " in the defences for Sir Hugh Munro, which, though " not exactly in evidence, is probably correct, and is " at any rate the judicial statement of the pursuer's " father. He states that he took the opinion of English " counsel, and was advised that, ' he being by birth a " ' Scotsman, the representative of an ancient family in " ' that country, and which is his usual place of resi- " ' dence, a marriage celebrated in England or any " ' other place would be effectual ' to render his " daughter legitimate. We do not here speak of the " soundness of this opinion; but it is manifest, from " the way in which the case must have been stated, that " Sir Hugh himself, notwithstanding his protracted " absence, did still, without doubt, hold Scotland to be " his usual place of residence; and that, in entering " into the marriage, he distinctly contemplated that it " was in Scotland that the parties were chiefly to reside, " and in Scotland that all the incidents of the marriage " were to receive their fulfilment.

" The marriage having been concluded with this " character and purpose, and having been intimated to " Sir Hugh's friends in Scotland, he proceeded actively " to make the necessary preparations for executing it " effectually. Besides all the furniture which had been " previously put into the castle, at least two, if not

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"three, ship-loads of furniture were sent in the course "of the early part of that year, 1802, though only one "inventory has been preserved. Various orders were "given for the supply of other goods necessary for "their residence. When all was ready Sir Hugh "broke up completely his establishment in London, "dismissing all the servants except one, left in charge "of the house; and at last, very late in the season, Sir "Hugh, Lady Munro, and the pursuer reached Edin-"burgh in the first days of November 1802, and pro-"ceeded within a few days to Fowlis. The interval "between the marriage and the setting out for Scot-"land was not greater than was necessary for preparing "Fowlis for their reception, and cannot militate against "Sir Hugh's contemporaneous declaration that the "marriage was entered into with the view of his coming "to reside permanently in Scotland.

"It may be observed that the very lateness of the "season when this return to Fowlis took place proves "that all idea of the residence being temporary, if it "ever existed, had by this time been laid aside. "Indeed, by the testimony of Mrs. Sutherland it is "clearly established that the only cause which could "have occasioned any expression of doubt had been at "once removed when his marriage and intention of "residence were known. She depones 'that Lady "'Munro senior was much delighted with the expec-"'tation of Sir Hugh and his Lady coming down to "'Fowlis in 1802,' and expressed satisfaction at the "prospect of seeing the pursuer; and her expectation "was, that they were to reside permanently at Fowlis. "There is also abundance of evidence, to which it is "unnecessary particularly to refer, that there was an

" universal expectation in the country that the family " were coming with the intention of making Fowlis " their constant place of residence.

" It appears, accordingly, that they were cordially " received by Lady Munro senior and the other friends " and relations of the family; and Sir Hugh was so " entirely satisfied with his reception that he settled " himself without doubt or reserve in the castle of " Fowlis, and returned to the active management of his " extensive estate. We think it sufficiently in evidence " that the pursuer was treated and regarded both by " Sir Hugh himself and by the friends and relations of " the family as his lawful daughter. Certainly she " was reared and educated as such.

" After the parties had been thus completely settled " in permanent residence at Fowlis during a long " period the marriage was dissolved by the calamitous " death of Lady Munro in August 1803. That event " made no change on Sir Hugh's resolution to retain " his home and domicile at Fowlis; for, though he " still held the lease of the house in London, having " omitted to avail himself of the first break, he never " went near it, but continued constantly resident in " Ross-shire until September 1808. By that time the " pursuer was twelve years old, and it is abundantly " proved by Lady Mary Ross that Sir Hugh's 'sole " 'object in leaving Fowlis and going to London' at " that time was 'to complete Miss Munro's education; " 'in which step both the deponent and Sir Charles " 'Ross concurred, as both fitting and necessary for a " 'person of Miss Munro's prospects;' while it is " proved also, that it was still the wish and intention of " Sir Hugh to make Fowlis his permanent residence.

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" Sir Hugh had not availed himself of either of the " breaks in the lease of the London house. This cir- " cumstance has been thought to imply that he had no " intention of permanently residing at Fowlis. If this " has reference to the time of the first break of seven " years, it is falsified by the fact that he did reside there " permanently for six entire years. His not giving up " the lease at the expiry of the seven years is easily " explained: he had a feeling of doubt how his lady " might be received by his friends in Scotland. Christ- " mas 1802 was the first break. It required three " months notice; and at the 25th September Sir Hugh " was still in London. He may well be supposed to " have wished to retain the means he already possessed " of provisionally or occasionally residing in London " (as Lord Sommerville did), without at all impeaching " the reality of his 'principal desire and intention.' " The next break occurred at Christmas 1809. Before " that time Sir Hugh had gone to London for the edu- " cation of his daughter, so that he then naturally con- " tinued to hold the lease which he already had.

" We do not think it necessary to trace the evidence " farther. Sir Hugh appears to have been occasionally " in Scotland in the subsequent years, and afterwards " permanently from 1817 to 1820. His actual resi- " dence posterior to that time appears to be of no " materiality to the present question.

" Taking this review of the facts in Sir Hugh " Munro's history, we are of opinion that he had not " ceased to be a domiciled Scotchman at the date of the " pursuer's birth or at the date of his marriage to the pur- " suer's mother; that, as that domicile had never been " abandoned, so the marriage was entered into with refer-

" ence to his status as a domiciled Scotchman, and also in " distinct contemplation of the permanent residence of " the parties in the mansion house of that domicile. " That he personally lived in London during six years " is true; but as the question is, whether he could lose " the domicile of origin and choice which he previously " had by the mere fact of his bodily presence in Lon- " don, without the animus and purpose to abandon that " domicile and to fix his residence animo remanendi in " London, so we are of opinion, upon all the evidence, " not only that he never had such an intention, but " that his positive intention, belief, and understanding " were at every point of time the reverse. We do not " consider this as depending on expressions in his " letters of an intention to regain his Scotch domicile at " some undefined period, as if he had first lost it. " That is not the nature of the correspondence in this " case. It is clear that at the first he had no intention " of making any protracted residence in London, and " year after year there was plainly a bonâ fide present " intention, definitely expressed, of returning imme- " diately, or within some short time, to resume the " management of his estate. That intention was never " given up; and whatever were the causes which occa- " sioned the delay, they were not causes which neces- " sarily implied or required a permanent domiciliation " in London. Accordingly, as soon as he made up his " mind to the celebration of the marriage, and the " cause of detention was thus removed, the resolution " of returning became determinate, and he did again " fix himself in permanent residence in the Castle of " Fowlis. But we farther do not consider this question

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" as to the animus of Sir Hugh when he left Scotland, " or while he sojourned in England, as depending " simply on any mere expressions of intention, clear " though they be. We apprehend that the result in " the actual domiciliation in the Castle of Fowlis, as " soon as it was fully prepared, must be applied back- " wards upon all those expressions of his purpose, " giving reality to the positive intention at all times " declared, and demonstrating the negative of the pro- " position that he ever had the animus necessary to put " an end to his fixed domicile or ever did take up his " abode in England animo remanendi.

" We shall suppose the case of a young gentleman " of family and fortune going to Paris for his amuse- " ment, originally intending a mere excursion for a " short season; that he is by accidents detained, — " perhaps by a protracted suit at law, perhaps by the " difficulties of an honourable suit in a gentler court, " —but that, while he writes constantly of his intention " to return speedily, telling or not telling the cause of " the delay, successive perplexities postpone the time " of it; could it be, that after all was settled, and he " kept his purpose, formed at first, held at all times, " from day to day and year to year, and executed at " last, perhaps by bringing to his own home the lady " whose favour he had so perseveringly sought, — the " law of his own country should declare, that, contrary " to his constantly proclaimed purpose and intention, " any circumstances in the mode of his temporary resi- " dence occasioned by incidents quite extraneous and " opposite to all his own thoughts of domiciliation, he " had abandoned the domicile of his only home, and

" for the time fastened on himself the domicile of his " transient sojournment during long deferred hope? " We should think that it would not be so held.

" Indeed, when we review the case of Sommerville " and the doctrines there delivered, we think that the " principles of it apply in the most distinct manner to " the present case. The cases are not identical in the " facts: no two cases are so; but they are identical " in this, that, though in Lord Sommerville's case there " was a domicile of a certain order held to be estab- " lished in England, the question still was, whether he " was so domiciled with that animus remanendi which " alone could extinguish his domicile of origin, as the " rule for all questions in which there can be only one " governing domicile. And we are of opinion that in " the present case there was no such animus in Sir " Hugh Munro, but, on the contrary, that the evidence " proves that, though there was residence in England " for a time, it was, in the mind and intention of Sir " Hugh Munro, from first to last, of a temporary " character.

" Being thus of opinion that Sir Hugh Munro's " domicile was in Scotland, we come now to apply this " to the question concerning the pursuer's legitimacy. " If any thing depended on the domicile of Sir Hugh " at the date of the pursuer's birth, we have already " observed that there could, in our opinion, be no " doubt of it, and consequently that the pursuer, " though born in England, must be considered as the " acknowledged daughter of a domiciled Scotchman. " We shall afterwards advert to what is said of her " condition, as born in England of an Englishwoman " not then married. But in reality we attach little

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" importance to the force of the domicile as applied to " the time of the pursuer's birth. It is in the formation of the marriage that the husband's domicile " comes to be of paramount importance; and to that " we shall now direct our attention as the point on " which our opinion of the pursuer's legitimacy rests, " and in which we believe most of our brethren would " concur with us if they were satisfied that the domicile was in Scotland.

" Assuming Sir Hugh Munro to have been a domiciled Scotchman at the date of his marriage to the " pursuer's mother, we are of opinion that that marriage, though celebrated in England, must be considered as in law a Scotch marriage, in respect of " all the incidents and consequences of marriage. In " general the law of the domicile regulates this matter, " as held in the case of Ross, and laid down by Story, " p. 156, and other writers. Put the simple case of " a Scotchman, about whose domicile there is no doubt, " going into England for a few weeks or months, and " there marrying an English lady, and returning with " her to his residence in Scotland; we believe that no " doubt is or can be entertained that that marriage " must be considered as to all effects a Scotch marriage, as truly as if it had taken place in Scotland; " and that neither the place nor the manner of its " celebration can alter its character. And it cannot, " in our apprehension, be of any consequence, that " before that marriage the lady may have been a " domiciled Englishwoman, who never was in Scotland, " for in the moment and in the act of the marriage " the wife necessarily adopts and becomes attached to " the domicile of the husband; and, therefore, her

" previous domicile, being thereby sunk in his, can be " of no more importance in the question than if, being " a domiciled Englishwoman, she had been married " within the bounds of Scotland.

" If there could have been any doubt of this legal " doctrine, every such doubt is removed by the late " decision of the Court and the House of Lords in " the case of Warrender against Warrender,[1] which " appears to us to be a case of very great importance " in the present question. By the law of England " marriage once contracted cannot be dissolved except " by act of parliament; and questions have been " agitated in which different opinions have been formed " in the case of persons being English and domiciled in " England, and being married there, when they after- " wards come to Scotland, and having obtained a " domicile there insist for dissolution of the marriage " in the Scotch Courts. But in that case of War- " render, though Sir George had resided a great deal " in England, he was held to be undoubtedly " a domiciled Scotchman. Being so, he married " in London the daughter of Lord Falmouth, born " and educated in England, and who had never been " in Scotland. Sir George insisted against the lady " for divorce in the Scotch Consistorial Court. It was " pleaded in defence that there was no jurisdiction to " dissolve the marriage, in respect that it was a mar- " riage celebrated in England, which by the law of " that country was indissoluble; but it was held that " the competency of the action to that effect must be " sustained; and although other views of great impor-

[1] See post, p. 585.

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"tance were taken of the case, we understand it to "have been distinctly held, by both the eminent Judges[1] "who decided that cause in the House of Lords, that "the domicile of the husband is the domicile of the "wife, and that Sir George Warrender's domicile "having been clearly in Scotland at the time of the "marriage, the marriage must be held and treated, in "regard to all its incidents and consequences, as a "Scotch marriage; and on that ground, independent "of others, that it was competent for Sir George, "being domiciled in Scotland, to insist for dissolution "of that marriage in the Scotch Court. Holding this "to be sound in principle, and ruled in that important "case, we think that the application of it to the "present case is clear and direct.

"For, it being in our opinion sufficiently established "that Sir Hugh Munro's domicile at the time of the "marriage was in Scotland, and the domicile of the "pursuer's parents having undoubtedly been in Scot-"land when that marriage was dissolved, the marriage "must be dealt with as a Scotch marriage; and as it "is one of the incidents of such a marriage, being "Scotch, that the child of the parents so married, at "whatever time born, is legitimate, it follows that the "pursuer was by the effect of the marriage under "the law of the domicile effectually secured in her "right as the legitimate daughter of her father.

"But we cannot leave this point without observing "that if the marriage of the pursuer's parents, regu-"larly celebrated, though in England, were not to be "considered as a Scotch marriage to these effects, the

[1] Lords Lyndhurst and Brougham.

" case would present a most extraordinary result in " the law, and a case of extreme hardship. If Sir " Hugh Munro had celebrated no marriage in Eng- " land, but had simply brought the pursuer's mother " to Scotland, and introduced her to his mother and " his relations as his wife, had written the letters which " he did, designing her as his wife, and had cohabited " with her in the Castle of Fowlis by the distinct " character of Lady Munro, his lawful wife, there " would have been very marriage between these parties " contracted in Scotland and under the law of Scot- " land,—between parties certainly domiciled there,— " as effectual as any celebration of marriage could have " made it; and all the incidents of a Scotch marriage, " including the legitimacy of their acknowledged " daughter, would have followed. This is the case of " Mr. M'Douall of Logan, now before the Court, in " which we, concurring with the great majority of the " Judges, hold the legitimacy to be clearly established. " But it will be a singular case of hardship, if Sir " Hugh Munro, desiring to fulfil his pledges to the " pursuer's mother, and to do justice to the pursuer in " the most unequivocal and legal manner, shall be " found to have placed the pursuer in a worse con- " dition, and actually to have stamped illegitimacy " upon her by the act of celebrating a regular and " lawful marriage according to the forms of the place " where he happened to be for the time. We cannot " reconcile this to the principles of justice. But we " see that the possibility of so strange a result taking " place is at once removed, if we be right in holding " that the marriage in question, though celebrated in " England, is truly to be considered as a Scotch " marriage.

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"There remains, however, a point on which the "defender places great reliance. It is maintained that, "the pursuer having been born in England of an "English woman not married at the time of the birth, "she was born an illegitimate child; that that status of "illegitimacy was indelible by the law of England, and "that the subsequent marriage, even taking it to be "a Scotch marriage, could not legitimate the child, or "wipe off the indelible stain of illegitimacy. We cannot assent to this proposition; and, with all possible "deference to any different opinions, we know of no "authority for it in the law of Scotland, or among the "jurists and writers on general law, in the application "here attempted to be made of it. We are no doubt "aware of certain dicta thrown out by high authorities "in the law of England in the case of Ross and "another case[1] there referred to; but in the case of "Ross the point was expressly waived by the Lord "Chancellor as not necessary to be decided, and the "judgment went distinctly on the ground that the "parties were both domiciled in England, and that, "though the marriage was formally in Scotland, the "parties had gone there for that purpose only, and "returned immediately to England, their proper domicile; thus affording another example of the principle, "that, though a marriage may be celebrated in one "place, it is in respect of the incidents of marriage to "be regulated by the law of the husband's domicile. "And we have yet seen no case in which this principle "of indelibility has been applied under the law of "Scotland, whether in this Court or in the House "of Lords. Both in Sheddan v. Patrick and in Strath-

[1] Strathmore Peerage.

" more the domicile was held to be the ruling point, " sufficient for judgment.

" To say that the pursuer was born illegitimate " because her parents were not married at the time " of the birth, is to say no more than could be said in " any such case, whether the child were born in Scot- " land or in England. There may be a question, to " which we have already alluded, as to the competency " of inquiring into this in Scotland, where the parents " have been clearly married, and have been domiciled " there, and no impediment recognized by the law of " Scotland can be stated; but, as a matter of fact, it " is true in every case that till the marriage the child " is illegitimate. Such a fact, therefore, does not in " the least advance the argument for the point to be " made out. To say, again, that because the child " was born in England of an English mother the " illegitimacy is indelible,—if this means that it is in- " delible by the law of England, and under the law of " England,—is to say no more than that the law of " England has not adopted the rule of legitimation per " subsequens matrimonium. But if it be meant, that " because the child was born in England it cannot " become legitimate in Scotland by a Scotch marriage, " in a question to be determined by the law of Scot- " land, it is a petitio principii, for which there is no " authority whatever in that law. The presumption on " which the rule of legitimation is generally held to " depend is, that at the time of the child's being be- " gotten there was a consent to marriage, and that the " marriage when it takes place draws back to that time. " But why this presumption should be prevented from " operating in the law of Scotland, merely because it " is not admitted by the law of England, is not at all

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"obvious to us. We are here in a Scotch question "and in a Scotch court, applying a plain rule of our "own law; and, unless that law says that if the child be "born in England it shall not have the benefit of the "rule, we do not see how it is at all material that it "could not enjoy it if the law of England were to be "applied to the case. But we know of no such excep- "tion in the law of Scotland, nor, as far as we are "informed, is there any such exception recognized in "the law of any country which holds the principle of "legitimation per subsequens matrimonium.

"We are not here giving any opinion on a point of "which it does not belong to us to form any judgment. "We are not inquiring what the law of England might "decide, if the pursuer, or any person similarly situated, "were making a claim in an English court of law in "respect of property within their jurisdiction. We "observe that Professor Story has said [1], that 'a person "'born before wedlock, who in the country of his birth "'is deemed illegitimate, may not, by a subsequent "'marriage of his parents in another country where "'such marriage would make him legitimate, cease to "'be illegitimate in the country of his birth.' We "may have doubts of the soundness of this doctrine in "international law, if it were meant to be indiscrimi- "nately applied to all cases, which we imagine it is "not; but it is a point with which we have no occa- "sion or competency here to deal. The very state- "ment of it in this form implies that the supposed "indelibility is confined to the country of the birth, "where alone it can operate. Whether such a ques- "tion would be so decided by the courts of England,

[1] Conflict of Laws, p. 99.

" if the pursuer were making any claim in those courts, " we cannot presume to form any opinion. We are " aware that conflicts of law may take place, and there " is no help for it when they do occur. But the ques- " tion before us is a purely Scotch question, to be ruled " by general principles no doubt, but still with refer- " ence to the law of Scotland in the particular point; " and we cannot, in consistency with the established " principles of that law, hold that this pursuer could " not become legitimate by the marriage of her parents, " when or wheresoever she may have been born.

" It appears to us to be very clear that the circum- " stance of the mother being English adds nothing at all " to the supposed difficulty in the place of the pursuer's " birth. She was certainly illegitimate by the law of " England and by the law of Scotland also at the " time of her birth, and she would have been so equally " though her mother had been a Scotchwoman. But " if Sir Hugh Munro was a domiciled Scotchman, " and if the marriage is in consequence to be taken as " a Scotch marriage, the wife adopting the husband's " domicile and becoming a Scotchwoman, and if, again, " the place of the birth by itself creates no indelibility " in the law of Scotland to prevent the marriage from " legitimating the child, we are quite unable to perceive " how such an indelibility can arise from the circum- " stance, that the wife and mother was an Englishwoman " at the time of the birth.

" On the whole, we are of opinion that the pursuer " is entitled to prevail in the conclusions of her de- " clarator."

This cause having been put down by the Lords of the First Division to be advised upon these opinions, along with the preceding case of the Countess of Dalhousie v.

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M'Douall, the following opinions were delivered by their Lordships upon both cases:—

Lord President.—" In the case of Munro v. Munro " I concur entirely in the opinion of the majority of " the consulted Judges, but I cannot concur with them " in the case of M'Douall.

" To me it appears that there is no material dis- " tinction between the cases, and that the same prin- " ciples must rule both. I will therefore deliver my " opinion in both cases at the same time.

" The case of Munro is even stronger than that of " Ross. In the case of Ross there was, at least, a mar- " riage in Scotland in form, and in validity in one " sense of the word, though it was entered into merely " for the purpose of committing a fraud on the law of " England as to bastardy; but in this case of Munro " the only marriage was in England, and the status of " marriage was by this English marriage indelibly fixed " on the parties, so far as the constitution of the mar- " riage at least was concerned. Whether that could be " dissolved afterwards is a separate question. No doubt " they afterwards cohabited in Scotland, so as to have " made them married persons by habit and repute if " they had never been married before; but previously " they had been firmly, solemnly, and indelibly married " in England, and that marriage could neither be " strengthened nor weakened by any subsequent con- " duct in Scotland.

" But I must go farther, because I am of opinion " that in the whole of this argument too much stress " has been laid on the domicile of the putative father; " and because I think that attention has not been paid " to the difference between the constitution and sub- " sistence of personal status, and the consequences which

" may result from personal status once fully constituted, " when the parties either had a previous domicile or " afterwards fixed their residence in a different country.

" As to the domicile of the putative father, I cannot " think that either his past, future, or present domicile " can or ought to have any effect on the status of the " bastard. The father is tied to his legitimate child " by the strongest bonds of the law. The connexion " betwixt them is inseparable and unavoidable. The " general rule of 'pater est quem nuptiæ demonstrant,' " is absolute in regard to all children born in wedlock, " save in a few special exceptions; and therefore the " domicile and status of the father fix those of the " legitimate child. But there is no legal tie between a " bastard and his supposed father; the father is not " regarded in law as his father; therefore nothing in " the putative father's domicile can affect the status of " bastardy impressed on the child by birth.

" In law the bastard has no father. This is expressly " laid down by Blackstone as to the law of England, " where this bastard was born; he says, 'all other chil- " 'dren have their primary settlement in their father's " 'parish, but a bastard in the parish where born, for " 'he hath no father;' and the same is the law of " Scotland.

" Now the pursuer in this case, Miss Law or Munro, " was unquestionably an English bastard at her birth. " Her mother was the only parent recognized by the " law of England; she never might have been able to " fix paternity for her child on any man. The mother " is primarily liable to maintain her bastard, and if she " cannot it must be maintained by the parish; at least " this used to be the law of England, before the late " Poor Law Act. No doubt, in order to relieve the

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" parish, the mother may attempt, and may succeed in " the attempt, to fix on a particular man as the father " of her child; in which case she or the parish could " call upon him to maintain it for a certain period, and " this without any regard to his domicile, or any pecu- " liarity in the law of that domicile to exempt him from " this obligation.

" But this obligation to maintain the child does not " affect its status as a bastard; he remains a bastard as " he was before, without any legal connexion with his " putative father, subject to the same disabilities or pri- " vileges of a bastard in England, whatever they may " be. His only legal parent is his mother, and this " only to the effect of the burden of maintenance in " infancy, for in no other respect does he derive any " right even from his mother. Therefore I cannot see " how the domicile of the supposed father ought to have " the smallest effect on the status of the child, and on " the question whether it is or is not a bastard. Sup- " pose that, by the law of the putative father's domicile, " a bastard were entitled to share more or less with his " lawful children in his succession ab intestato; this " could not alter his status of bastardy, or place him in " any other respect on a footing with the lawful chil- " dren; indeed, he must plead his bastardy even to give " him this particular privilege. Or, suppose that the " law of the father's domicile gave the father a right to " claim and take the child from the mother, and that " the mother in England resisted, he could not succeed. " If he had been found liable in maintenance, perhaps " that might give him some claim to the custody of the " child, though I do not know that it would. But, " certainly, without that specialty he could not take " the child from the mother, merely by alleging that

" the law of his domicile would have allowed him to " do so.

" In short, I cannot see the smallest connexion " between the status of the bastard and either the " previous or the subsequent domicile of his puta- " tive father. The child in England was born a bas- " tard; and it cannot make any difference whether " his putative father was a Scotsman, or a French- " man, or a Turk. Accordingly, what was the opinion " of the Judges in the House of Lords, in the very " analogous case of Strathmore? And I take that case " as my text, because in deciding it the learned Lords " laid down the law generally as to the effect of per- " sonal status. In that case Lord Eldon said, 'he was " 'born in England of an Englishwoman, who never " 'had been before in Scotland. The law, there- " 'fore, which attached at his birth was the law of " 'England; and if his mother and supposed father had " 'died within a few years after, unquestionably he was " 'an illegitimate child, born in England, subject only " 'to the law of England, and having no character " 'whatever but that which had been derived from his " 'mother.' Then the Lord Chancellor Lyndhurst [1], " after speaking on the supposition of a marriage in " Scotland, and having that expressly in view, said, 'It " 'appears to me to be unnecessary to go into that " 'point. It is sufficient that the child be born in a " 'country where the illegitimacy is indelible. This " 'in any country whatever would have the effect of " 'rendering that child illegitimate.' Then Lord " Lyndhurst goes on to say, quoting the words of Lord " Redesdale, 'I do not enter into the question, whe-

[1] In Rose v. Ross.

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" 'ther, if this marriage had been entered into in Scot-
" 'land, it might have had the effect of legitimizing the
" 'child, because I think it is not necessary.' Then
" Lord Lyndhurst himself adds, 'I agree with the
" 'noble and learned Lord. I do not think it neces-
" 'sary; but I must say that I do not conceive how it
" 'could have that effect.'[1]

" Nor can I. I cannot conceive how any subsequent
" event whatever, whether by the parents or otherwise,
" can have a retrospective effect to alter a status once
" effectually constituted. But more of this hereafter.
" In the meantime Lord Chancellor Lyndhurst goes
" on thus: — 'The opinion of Lord Redesdale is quite
" 'obvious from what I have stated, and from a sub-
" 'sequent passage, in which he considered the position
" 'of the child at the time of its birth as deciding the
" 'case.' Then Lord Chancellor Lyndhurst proceeds,
" 'Taking the whole of the judgment of the noble Lord
" 'together, I conclude that he is of opinion that if the
" 'child was illegitimate at the time of its birth accord-
" 'ing to the law of the country where it was born, that
" 'character was stamped upon it indelibly. No sub-
" 'sequent marriage could render it legitimate.'

" And this, it will be remarked, is given as their
" opinion without any qualification as to the domicile
" of either parent, or as to the marriage being in one
" country or another. It is generally, that no marriage
" could render the child legitimate. Then Lord
" Wynford said, 'I will merely say, that I entirely
" 'concur in every thing that has fallen from my noble
" 'and learned friends. All jurists agree that the per-
" 'sonal status of a man must be decided by the law of

[1] See post, p. 590.

" ' the country in which he is born. This person was " ' born in England a bastard, and by the law of " ' England bastardy is indelible. He cannot become " ' legitimated.' And this he gives, without limitation " or exception as to the means by which the bastardy is " attempted to be effaced, either by marriage in Scot- " land, or by reference to the domicile of the putative " father; and then he cites the opinion of Boullenois, " in the case of De Conti, to which I referred in my " opinion in the case of Ross, and which Boullenois " sums up thus: ' parce qu'il porte partout l'etat et la " ' condition dont il est par les loix de sa nation.' " Accordingly, by the law of England a bastard has " faculties which in Scotland he has not. He has the " jus testamenti faciendi, which in Scotland he has not, " and which the domicile of his putative father could " not affect. But I deem it unnecessary to prosecute " this point farther, and therefore I shall now proceed " to consider a point which I think has been overlooked " on this subject of personal status; id est, the distinc- " tion between the original constitution and continual " subsistence of the status once properly acquired, and " the consequences, pecuniary or otherwise, which may " result from it in different countries.

" I have already mentioned that a bastard in England " has the jus testamenti faciendi, which in other coun- " tries he may not have; and there may be other " countries, for any thing we know, in which he may " have more important rights in connexion with legiti- " mate children.

" This seems to have been the case with Abraham " and among his descendants. It appears from what " Sarah said to Abraham (see 21 Genesis, v. 10.), that " Ishmael would have been heir along with Isaac if

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" Abraham had not cut him out. She said, ' Cast out " ' this bond woman and her son, for the son of this " ' bond woman shall not be heir with my son, even " ' with Isaac.' And Jacob's children by his two con- " cubines seem to have been exactly on a footing with " his children by his two wives Leah and Rachel.

" But I do not confine my opinion to the case of the " status of bastardy. I think the same reasoning and " the same rules apply to other kinds of personal status, " in which the status and personal condition of the " parties are indelibly fixed, though the consequences, " personal and patrimonial, may vary in different coun- " tries from which they originally came or to which " they may afterwards resort. Take the case of mar- " riage. A man and woman meet in a foreign country, " and are there married according to the laws and " ceremonies established there. That marriage is good, " and will be acknowledged to be so in every civilized " country. They could not dissolve it by reference to " the domicile of either party, where by law such rites " and ceremonies would not have constituted a valid " marriage. The status of married persons is indelibly " stamped upon them, and no previous domicile or sub- " sequent change of domicile could affect it. But the " personal and patrimonial consequences resulting from " this status so effectually and indelibly constituted " may be different in different countries. If they con- " tinue in the country where they were legally married, " the husband and wife may have certain personal pre- " rogatives and privileges and certain rights and powers " over their respective properties peculiar to that coun- " try. If they return to their own country, or remove " into a third country, all these may be totally changed; " but no consequences of this kind affect the consti-

" tution and subsistence of the status of marriage " originally and legally stamped upon them. Married " they were, and married they must remain. No pre- " vious domicile or change of domicile can unmarry " them; they carry that status with them wherever " they go, as Boullenois says; and if they have not " settled their rights by a contract, they must take their " chance of the effect which change of residence may " produce. The same is exactly the case in the status " of allegiance. If a person is born subject to allegiance " to the Crown of Great Britain, no previous domicile " of his father at a remote period and no change of " domicile by himself or his father can dissolve his " allegiance.

" If he conspires against the life of the Sovereign or " is found in arms against him, he is guilty of treason, " and he cannot plead the old domicile of his father or " any change by himself as a defence.

" But this status of allegiance may have very different " effects and consequences, either advantageous or other- " wise, in other countries. But these arise out of the " existence of the status as validly established; and, so " far from abrogating it, they presuppose it a continued " and indelible existence.

" The Scots had till lately certain privileges in Hol- " land, and there was an officer, as your Lordships " know, called the Conservator of the Scotch privileges " at Campvere, whose duty it was to guard those privi- " leges and to settle disputes between Scotch merchants " settled there. And in old times, during the alliance " between the Crowns of Scotland and France, the Scots " had certain privileges in that kingdom. Among " others, they were exempted from the droit d'aubain.

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" In like manner, after the union of the two Crowns " under our James VI., the post nati, as they were " called, had privileges in England which the ante " nati had not. In other countries, again, being born " subject to the allegiance of Scotland or any other " country may subject a person to burdens and inca- " pacities from which natives of those countries are " exempted. But nothing of all this affects or touches " the status itself, which remains fixed and indelible. " Born a bastard or a Scotsman, or legally married, " those characters remain stamped on him for ever, " wherever he goes or chooses to domicile himself. " These principles I apprehend to be quite indisput- " able; and they go directly to prove that the original " status of bastardy cannot be affected by any conduct " or operation of the putative father.

M'Douall's Case.

" All these principles applicable to the case of " Munro apply also to this case, unless there be any " facts and circumstances in it which render these prin- " ciples not applicable.

" Now what are the facts in this case?

" Mary Russell, the pursuer's mother, was domiciled " in Scotland ratione originis only, and in no other way. " She never had selected that country for her domicile " by having a house of her own. She lived with her " father, in his family and under his protection.

" But the domicilium originis is the weakest of all, as " having been induced without any consent on the part " of the child.

" Now in 1796 she voluntarily left her father's family " and forisfamiliated herself. She chose to form an

"unlawful connexion with Colonel M'Douall, and for "a short time resided under his protection at Culgroat. "Then, when his regiment was ordered to England, "she voluntarily accompanied or followed him there. "She was not under any obligation to do so. She was "not his wife — she was not his servant. She might "have left him at any moment, and without his consent; "but she did not do so. She voluntarily continued in "England, and at Chester was delivered of the pursuer. "Unquestionably, therefore, the pursuer was born a "bastard in England; and unless something happened "afterwards to alter his condition, that condition was "indelible bastardy; and so it must be admitted to "have continued for at least twelve years, down to the "acknowledgment of marriage in 1808.

"In the case of Ross I stated in my opinion that I "would not take the law from such an extreme case as "that of a woman taken suddenly, and perhaps pre-"maturely, in labour, while travelling in England with "or without her paramour, and brought to bed of a "bastard there, and then returning with it on her "recovery to Scotland. That is an extreme case, and "what might be the law as to it we must endeavour to "settle when such a case occurs. But this is not Mary "Russell's case. She was not in England on a mere "jaunt, or for some obviously temporary purpose. On "the contrary, it is plain that she contemplated a "much more protracted residence in that country, and, "as it afterwards appeared, a permanent residence. "At any rate she was there at the time of the birth by "her own free will and choice, and she so continued "there. She had it completely in her power, if she "had so chosen, to return with her child to Scotland as

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" soon as she recovered from her confinement. Colonel " M'Douall could not have prevented her. But she " chose to remain in England. If it be said that she " remained there merely on account of her connexion " with the Colonel, the answer is, that it was her own " free choice to do so. But, in point of fact, it was not " the case. The Colonel's regiment was disbanded in " 1799 or 1800, when he returned to Scotland. But she " did not follow him, nor return to her father's house, " nor to any other place in Scotland; she fixed her " abode in Penrith, in a house which the Colonel pro- " vided for her. But it was her own free choice to " remain there. She did remain there, and I am per- " suaded would have continued there if the subsequent " marriage in 1808 had not taken place. It is plain, " if it were of any consequence, that even the Colonel " himself originally had no intention that she should " return to Scotland; and it is equally plain, that till " the marriage she herself had not the least intention of " returning there and resuming her domicilium originis. " On the contrary, she showed evidently that it was her " intention to remain in Penrith; for she brought up " her mother and sister and then her brother to live " with her; and there she remained in all appearance " permanently domiciled till 1808. But in order to " constitute domicile it is not necessary that the party " should have a fixed and determined purpose to " remain in his or her present residence for ever. It is " enough if they have resided for such a length of time " as to show that they had chosen that place as their " only and proper home for that time; and no vague " and floating intention which they may have expressed " of returning to their country at some future time can

" alter the domicile so acquired by long residence. " Nay, in the case of Bruce[1], who was actually on his " return to Scotland from India, but died on the " passage, it was held and found by the House of Lords " that India was to be held as his domicile; and his " succession was regulated by the law of England, and " not of Scotland, to which he was returning. In short, " from the birth of the child in 1796 till the marriage " in 1808, no less than twelve years, she was a domiciled " Englishwoman. Therefore, if the residence and do- " micile of the mother at the time of the birth of her " child and for years thereafter be of material con- " sequence, then her residence and chosen domicile for " twelve years fixes the status of the child to be that of " indelible bastardy.

" It does not appear to me to be of any consequence " that the house in Penrith was not her own property, " but the colonel's, and that he allowed her to live in it " rent free. Still it was her own voluntary residence, " and constituted an English domicile as much as if she " had bought or hired it; and she had no inducement " under her loss of character to return to Scotland, and " never showed the least intention of doing so, or that " she was not in England animo remanendi; and that " this animus, in all human probability, never would " have been altered but for the event of the marriage, " which she could not foresee, and probably little ex- " pected. Therefore, on the whole, I am of opinion " that all the principles applicable to the case of Munro " apply to this case of M'Douall, and that none of the " facts and circumstances lead me to form a different

[1] See post, p. 600.

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"opinion. I may add, in regard to the Warrender "case, that it appears to me that the effect of the judg- "ment there has been misunderstood. Sir George "Warrender was married in England, though it is of "no consequence where the ceremony took place, since "he was legally married according to the forms re- "quired by the English marriage law, and therefore "his domicile became that of his wife. But it is a "different thing where the parties are not married, for "the domicile of the paramour is not necessarily that "of his mistress, there being no connexion between "them which the law recognizes. Sir George War- "render, however, being legally married in England, "and being found to be a domiciled Scotsman, his "wife's domicile, in the eye of the law, was likewise "Scotch, and an action might competently be brought "against her in Scotland. Accordingly all that was "found by the decision was, to hold the action of "divorce to be legally brought against her in Scotland, "because she might be held as a domiciled Scotch- "woman. The effect which this finding will have upon "the decision on the merits of the case we do not as "yet know, the only thing fixed being, that the right "of action against her lay in the Scotch courts. This "might be very important to Sir George Warrender "in other respects, for he might have to bring actions "against her of another nature. She might have ac- "quired separate property, in regard to which it might "be necessary for him to sue her; and she could not "have validly pleaded in defence that she was domi- "ciled in France. However, the status of marriage has "been indelibly fixed by the English celebration, and "by this decision her domicile, as a married woman,

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" has been held to be that of her husband; and this is " all the length to which the judgment in this case of " Warrender goes."

Lord Gillies.—" I have listened with great attention " to the opinion which has now been so ably stated, but " I must own that it has not altered the opinion which " I had previously formed. I shall not be sorry, how- " ever, if it makes a stronger impression in another " quarter. We have two cases before us, both of great " importance, and both of them attended with extreme, " I might almost say unprecedented, difficulty. I do " not mean to trouble your Lordships with the reasons " in detail which lead me, agreeably to my original " opinion, to concur with the majority in the case of " M'Douall. In the other case I must own that the " opinion which I had at first formed is changed, and " I am now inclined, though with some hesitation, to " concur with the minority in the case of Munro. I " shall not attempt to explain my reasons, as they are " most distinctly detailed in the opinion. Nothing is " more certain than this, that a man or woman having " appeared before a clergyman and been regularly " married, that marriage ceremony not only constitutes " them married persons, but in the eye of the law " converts the putative father into the actual father of " the children previously born; or, at least, he ceases to " be the putative father, and becomes undoubtedly the " legal father. That is undoubtedly the law of Scot- " land. But then in the case of Ross you have the " marriage in Scotland, and a child previously born in " England. The child was acknowledged both by the " man and the woman, but it was found that the child " was not legitimated, although the marriage was un-

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"questionably a good marriage. The child, it was "ultimately found, was and continued to be a bastard. "On what principle was this held? It was a judg- "ment pronounced, as I understand the case, on this "ground, that the domicile of Ross was not in Scot- "land, but in England; in short, that he was a domi- "ciled Englishman, and, because domiciled in England, "they held that the marriage in Scotland could not "have the effect allowed to it by the Scotch law, of "making legitimate the child. Now, if a domicile in "England prevents a Scotch marriage from legitimizing "the children, why, it seems to follow that a domicile "if in Scotland must render the children legitimate "by means of an English marriage. If the domicile "hinders the legitimacy in the one case, it should be "sufficient to accomplish it in the other. After all the "consideration I have been able to bestow on the cases "referred to, the true criterion as settled by them, and "particularly by the case of Cromarty or Ross, for "deciding this point is this,—was the putative father "domiciled in Scotland at the period of the marriage, "or was he domiciled in England? It is of no con- "sequence where the marriage is celebrated. It was "found in the case of Ross that the place of marriage "had no effect. It therefore brings every question "about the status of legitimacy to a question of fact of "the most difficult nature; depending not only on facts, "but on the inferences from facts. This doctrine like- "wise leads to this odd result, that when parties obtain "a licence from the Archbishop of Canterbury to be "married, he grants it, not only to the effect of making "them married persons, but to the effect of making "perhaps half a dozen bastards legitimate children.

"That seems the consequence that must follow from "the law as laid down in the case of Ross, that the "country where the marriage is contracted is of no "consequence, and that the domicile of the father alone "is to be looked to. If that be the law the question "here is, just whether Mr. M'Douall, the father, was "resident in Scotland or England, and whether he "continued a domiciled Scotchman. I am of opinion "that he continued to be domiciled in Scotland, and "that decides the question; and, although with some "difficulty, I likewise am of opinion that Sir Hugh "Munro was also domiciled in Scotland. That being "the case, I concur with the majority in the case of "M'Douall, and with the minority, I mean the four "Judges who signed the opinion, in the case of Munro.

Lord Mackenzie.—"I concur in the opinion just "delivered. I have been of the same opinion always, "and I do not yet see sufficient grounds to alter it. "In the case of Munro I concur with the opinion of "Lord Moncreiff and the other Judges who go along "with him. Concurring with them, it is not necessary "to resume the reasons for doing so, as that opinion "contains a full statement of the grounds of judgment; "but I may shortly refer to two points which I think "of importance. The first is the general question, "whether a Scotch marriage can legitimate an Eng-"lish bastard? I think that it may, for the reasons "stated in the opinion signed by me in the case of "Ross.[1] It is true that the House of Lords did not "sustain the legitimacy of Ross's child; but from the "speeches made on that occasion, I see they did not

[1] See post, p. 585.

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" reverse on the general point, but because they held " that the marriage was not to be regarded as a Scotch, " but an English marriage. It was upon that view the " decision went, thus saving and avoiding the general " point. I do not, therefore, think myself precluded " by the decision of the House of Lords from retain- " ing the opinion I had then, and have still, that a " Scotch marriage may legitimate an English bastard. " I cannot help entertaining doubt, whether the indeli- " bility of English bastardy has any meaning beyond " this, that an English bastard is not legitimated by an " English marriage. I doubt whether indelibility is " not rather a quality in the marriage than in the " bastardy. Otherwise, why does an English marriage " not legitimate a Scotch bastard? If the question " rested solely on the quality of the bastardy, then a " Scotch bastard ought to be rendered legitimate by " the marriage of his parents in England or in any " country. But suppose it were true that English " bastardy is indelible, not only against a marriage in " England, but against a marriage all the world " over;—I say, supposing there was produced a statute " providing and declaring that an English bastard born " in England should remain a bastard all the world " over, notwithstanding any thing that could be done " in any country,—I ask, could we give it effect? " Could we acknowledge the authority of such a " statute? I think we would be bound to say, that " the English parliament might rule the fate of bastards " in England, but that its laws were not entitled to " extend to other countries, and that there was no " principle of the law of nations which could give effect " to such a statute. The second question is, whether

" the marriage in this case was a Scotch marriage, " which is certainly attended with difficulty; but on " the whole my opinion is, that the marriage must " be considered as a Scotch marriage; and for two " reasons:—First, I think, on the whole, though not " without doubt, that the domicile of Sir Hugh " Munro at the time of his marriage was in Scotland; " and, secondly, that the marriage was contracted by " the parties with a view that they should live in Scot- " land, and not in England. That those two cir- " cumstances taken together must have the effect of " making the marriage be regarded as a Scotch mar- " riage: there are many authorities; but I think it " unnecessary to go beyond two, both decisions of the " House of Lords. The first is the case of Ross, and " the other that of Warrender. In the case of Ross " the marriage took place in Scotland. The parties " came on purpose to make it a Scotch marriage; " they stayed a considerable time to insure its being a " Scotch marriage; yet, the opinion of the House of " Lords was, that Ross, not being truly domiciled in " Scotland, but in England, in which he contemplated " living with his wife, this marriage, although con- " tracted in Scotland, clearly with a view to legiti- " mating the children, must be held an English " marriage, and for that reason could not have the " effect of legitimating the children. It fixed the " point, that a marriage may be contracted in Scotland " under the forms of the church of Scotland, but that " the party being a domiciled Englishman, and having " contracted it with the design of living in England, " it is in law an English marriage. And the case of " Warrender is the counterpart of this decision. Sir " George Warrender was married in England, by the

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" forms of the English church, to an English lady who " had never been in Scotland. It was held that that " marriage must be considered as a Scotch marriage, " because Sir George was a domiciled Scotchman, and " the marriage was contracted with the view of the " parties living in Scotland. For these reasons, it was " held a Scotch marriage, and for these reasons the " action of divorce, which was brought in Scotland, " was held not incompetent. With these two decisions " before me, I am clear that if in point of fact it is " made out that Sir Hugh Munro was domiciled in " Scotland, and that at the time he contracted the " marriage his intention was to come to live in Scot- " land, the marriage must be regarded, notwithstanding " the form of it, as being a Scotch marriage. The " chief difficulty was to make out satisfactorily from the " evidence that these two circumstances did exist; " but on the whole I am satisfied that they did, " and therefore I hold the marriage of Sir Hugh " Munro to be a Scotch marriage. Holding this, I " also hold that it was sufficient to produce the legiti- " macy of his daughter, although the bastardy was an " English bastardy.

" I think the case of M'Douall attended with less " difficulty. In that case I am not satisfied that the " bastardy was an English bastardy. The bastard, " although conceived in Scotland, happened to be born " in England; but I think, although a great deal has " been said on this point, that it ought to be viewed as " a Scotch bastard. But it is not necessary to go " into that, for, supposing it were held as an English " bastard, I still think legitimation would take place; " for there is no question that the marriage in this " case was a Scotch marriage, and in my opinion,

" therefore, must have the effect of conferring legiti-
" mation on the child. In that case, therefore, I agree
" with the opinion of the whole (consulted) Judges."

Lord Corehouse.[1]—" My Lord President, when this
" cause (Munro v. Munro) was reported, I issued a
" note explaining generally the views which I enter-
" tained of the law as applicable to it. But in conse-
" quence of the discussion which has subsequently
" taken place, the opinions which have been returned
" by the consulted Judges, and what I have heard to-
" day from your Lordships, I feel it incumbent upon
" me to enter a little more fully both into the law and
" the facts of the case.

" Various questions have been raised at the bar, and
" argued with great minuteness and ability; but it
" appears to me that the decision must rest on the
" circumstance where Sir Hugh Munro was domiciled
" at the date, not of the pursuer's birth, but of his
" marriage to her mother.

" It is admitted on both sides that the pursuer was
" born illegitimate, whether her parents were then
" domiciled in Scotland or in England. By the law
" of both countries a child born out of wedlock must
" necessarily be so at its birth. It is needless to advert
" to an exception or supposed exception to that rule
" in the law of Scotland, I mean as to the issue of a
" putative marriage, because it has no connexion with
" this case.

" The status impressed on a party by the law of his
" domicile continues when his domicile is transferred;
" but after it is transferred his status falls under the
" control of the law of the new domicile, and becomes

[1] Lord Corehouse had taken his seat in the First Division since the date of reporting the cause as Lord Ordinary.

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" subject to its operation. Whatever would change the " status of a person born or domiciled in Scotland, must " change the status of one born and domiciled else- " where, but who afterwards acquires a domicile in " Scotland. Were it otherwise, a person would import " into his new domicile not only the status which he " held in his previous domicile, but the law which regu- " lated that status, which would lead to inextricable " confusion.

" It has been argued at the bar, that if a person is " born illegitimate in England, his illegitimacy is inde- " lible, though he should remove his domicile else- " where. I am of opinion that that position cannot " be maintained; and I do not think that any of the " consulted Judges have held it to be tenable. In an " analogous case, the doctrine of a marriage being " indissoluble here because it was contracted in Eng- " land has been uniformly and, as I think, rightly " rejected by our Courts; and a single decision in " England to the contrary is, I believe, now viewed " in that country by the highest authorities in the " same light in which it has always been viewed here.[1] " As there can be no marriage, wherever contracted, " which is indissoluble in Scotland, on the same prin- " ciple there can be no illegitimacy necessarily inde- " lible. On this point I concur entirely with Lord " Gillies and Lord Mackenzie, and I conceive that " nothing turns in this case on the status either of the " pursuer or her parents at the period of her birth.

" At the period of Sir Hugh Munro's marriage he " was either domiciled in Scotland, or he was not. If " he was domiciled in Scotland at that time, his mar- " riage in England, celebrated according to the laws of

[1] Lolly's case. See observations by Lord Brougham, post, p. 617.

" that country, must have had the same effect as if it " had been legally celebrated in this country, and as if " parties had actually been resident here. ' Quando " ' lex in personam dirigitur respiciendum est ad leges " ' illius civitatis quæ personam habet subjectam, id " ' est, leges domicilii.'[1] ' Laws purely personal,' says " Boullenois, ' whether universal or particular, extend " ' themselves everywhere; that is to say, a man is " ' everywhere deemed in the same state, whether " ' universal or particular, by which he is affected by " ' the law of his domicile.' This aphorism is uni- " versally received. The same author says, ' that " ' the whole world acknowledges that the status of a " ' person depends upon his actual domicile.'

" The apparent exceptions to the rule arise in cases " in which the question of status is complicated with " other questions respecting the destination of landed " property, inheritance ab intestato, foreign contracts, " &c., to one of which I shall afterwards have occasion " to refer.

" It follows therefore, I conceive, that if Sir Hugh " Munro was domiciled in Scotland at the time of his " marriage in England, the pursuer would be legiti- " mated by that marriage.

" I observe that a doubt has been started, whether " this effect would have taken place, on the ground " that Lady Munro was domiciled in England at that " period, because the only recognized parent of an " illegitimate child is the mother. I do not think that " there is any room for that doubt. By the nuptial " benediction Sir Hugh's Scotch domicile, in the case

[1] Hertius de Confl. leg. p. 123.

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" supposed, would eo ipso have become the domicile " of his wife and his child, and the child would " simultaneously have acquired her father's domicile, " and the benefit of the Scotch law of legitimation.

" I think it is unnecessary to quote a series of autho- " rities in support of these propositions. I hold them " to be elementary principles of international law, and " they are not called in question by a great majority of " the consulted Judges and of your Lordships.

" But, on the other hand, let it be assumed that Sir " Hugh was domiciled in England at the time of his " marriage, and, in my humble apprehension, it follows " as clearly that the opposite result must take place.

" The pursuer was not legitimated by the English " marriage in that case, because, by the law of England " attaching on all the subjects of that country, legiti- " matio per subsequens matrimonium does not obtain. " Notwithstanding their marriage, therefore, and sub- " sequent to it, the pursuer remained illegitimate, and, " according to the aphorism already quoted, she was " illegitimate not only in England, but all the world " over.

" According to the same maxim, when her parents " and she removed to Scotland, and acquired a new " domicile there, she came with the status of illegiti- " macy affixed to her, and the mere change of domicile " per se could have no effect upon her status. Then " how could she be legitimated afterwards? Not by " the marriage of her parents, for they were married " before she came, and could not be married a second " time. The mere repetition of the ceremony, sup- " posing it had been repeated, which it was not, could " not operate upon her status any more than it could

" operate upon their status. It would have been a vain " and idle form. But there is no other mode of legiti- " mation known in Scotland (I lay out of view the " interference of the legislature). Therefore, if she was " not legitimated per subsequens matrimonium before " she left England, she must have remained illegitimate " after her domicile was removed to Scotland.

" It seems to be argued, though not very confidently, " that a different rule should be applied to this case, " because the question is involved, whether the pursuer " shall succeed as heiress of entail to a Scotch estate; " and consequently the law of legitimation per subse- " quens matrimonium must be applied wherever the " succession to landed property in Scotland is at issue. " I humbly conceive that that circumstance must be " entirely laid out of view, because the pursuer's right " to inherit land in Scotland depends entirely on her " status, and according to every principle of inter- " national law her status cannot be different in Scotland " from what it is in England. Status once impressed " and remaining unchanged must, as already said, be " the same all over the world. The English case of " Birtwhistle[1], which, I presume, is alluded to in the " pursuer's argument, does not, as I understand it, at " all infringe upon this principle. The decision in that " case proceeded on the ground, that by the statute " law of England no one can inherit property of a " certain description there unless he is born in lawful " wedlock. One of the judges says, ' I take it that " ' legitimacy alone is not sufficient to make a person " ' inherit soccage lands. It must be legitimacy sub

[1] Post, Appendix.

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" 'modo; the heir must be a child born after mar-
" 'riage.' By the same argument, if the pursuer
" could say that, in virtue of a Scotch statute, every
" child born of parents married either before or after
" his birth is entitled to succeed as heir under a Scotch
" tailzie, her plea would be irresistible. But there is
" no such statute in the law of Scotland. Her right to
" inherit depends upon her status alone.

" Let us come, then, to what I conceive to be the real
" and only question at issue: Where was Sir Hugh
" Munro domiciled at the date of his marriage? There
" is no doubt that Scotland was the domicile of his
" origin; that he retained this domicile while he was
" in England at his education, and on the continent for
" the benefit of foreign travel; and that he retained it
" after his return from the continent, while he resided
" with his mother at her house of Ardully in Ross-
" shire.

" But what was the domicile of his choice? When
" he returned from the continent he had no house of
" his own, at least no house which was habitable. The
" castle of Fowlis was ruinous, and he did not carry
" on the repairs which his father, Sir Harry Munro,
" had commenced. While he was in Ross-shire at that
" time he was a lodger or boarder with his mother for
" three or four years, and having a misunderstanding
" with her he left this country in 1794, and went to
" London, where he resided for eight years, without
" once setting his foot in Scotland. After living in
" lodgings for a short time he took a lease of a house
" for twenty-one years with two breaks, but of which
" he did not avail himself, and this was his permanent
" abode. It will be particularly observed that he did

" not go to London for the discharge of any temporary " duty, or in the exercise of any temporary office, or " for any transient object. He was not in the army, " the navy, or in parliament. He did not go to enjoy " the amusements of fashionable life during the fashion- " able season only, nor to superintend a lawsuit, nor " to bring any specific piece of business to a conclusion. " London was his ordinary and sole residence for seven " years before his marriage; it was so at the date of his " marriage, and continued to be so at least for one year " afterwards.

" Here then is a continued residence, a fixed abode, " for a long period of years. I do not say that resi- " dence of itself constitutes a domicile, but it is a main " ingredient in constituting the domicile of choice.

" There is another and still more important ingre- " dient. It was in London where he had his establish- " ment, and his sole establishment. The Code Civile of " France[1] declares, that the domicile of every French- " man is the place where he has his principal establish- " ment. That is not an arbitrary rule of French law; " it is drawn from a careful collation of all their writers " on this subject; and in consequence of that kingdom " being at one time divided into various states, in some " of which the Roman and in others a consuetudinary " law prevailed, this branch of jurisprudence was culti- " vated at an earlier period, and more successfully, than " in any other country in Europe.

" Now, as has just been said, Sir Hugh Munro had " no establishment before he went to London in 1794. " It was in London where his family and his servants

[1] Liv. 1. tit. 3. s. 102.

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"were then placed, and where they continued to reside. "There were his carriages, his furniture, his plate, his "pictures, his library, his wines, every article of use or "enjoyment in life according to the way in which he "chose to live. So far as domicile, therefore, is con- "stituted by fact, that is, by residence and establish- "ment, the proof of Sir Hugh Munro's domicile is "complete.

"But I am aware that domicile is not constituted by "fact alone, but facto et animo, and it is on the question "of intention that the pursuer takes her stand.

"It appears to me that the circumstances in which "Sir Hugh Munro fixed his residence in London and "formed an establishment there lead to the inference "that he meant to make it his fixed abode. When he "left the Castle of Fowlis in a ruinous state, and "stopped the repairs which his father had commenced, "he plainly did not mean to reside there. It was not "a fit abode for a Highland chief, or indeed for any "gentleman of his station and fortune. He rendered "it still more unfit for that purpose by letting off the "home farm and part of the lawn. In 1796 a lease of "the farm and lawn was granted for seven years with "a break at the end of three; but in 1799 the break "was discharged and the lease rendered absolute for "seven years. On the contrary, the lease of his house "in London was of a length that clearly indicated the "intention of permanent residence, coupled with the "circumstance that his whole establishment was there.

"It is said that Scotland being Sir Hugh Munro's "domicile of origin the presumption of law is that he "did not mean to change it. That rule may hold in "the general case, but here there are presumptions

"much more than sufficient to outweigh it. Sir Hugh "Munro was a gentleman of fortune, of talents, and "acquirements; he was educated from his youth in "England; when his education was finished he resided "eight years constantly abroad or in the metropolis. "He lived in the fashionable world in Paris and in "London, and that at the period of life when habits "and tastes are formed. Whether is it presumable, in "these circumstances, that at the age of thirty-one he "would fix his residence in London, or in a ruined "castle in the far north of Scotland, where he had no "employment or occupation, and where he could never "hope to enjoy the polished society to which, from his "youth upwards, he had been accustomed? I think "that the presumption is in favour of the London resi-"dence. Politics and agriculture, the motives which "most frequently induce gentlemen to reside on their "estates in the country, did not operate in his case. "He may have given his vote at an election, but he "never took any part as a candidate or active partizan. "As for farming again, we have seen that he let the "ground round his mansion upon a lease up to the very "door. Take these circumstances in connexion with "the fact that he did reside in London uninterruptedly "for eight years down to the period of his marriage, "and a year afterwards, there cannot, I conceive, be a "question that at that period his domicile was in "England, in so far as intention can be inferred.

"But there is a voluminous correspondence pro-"duced, and much reliance is placed on certain expres-"sions in his letters from London, bearing that he is to "return to Scotland, and to live at Fowlis. But do "those expressions, when read in connexion with the

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" context, import that he was to return to Scotland
" with a view to settle permanently there, and to live
" at the Castle of Fowlis during the rest of his life?
" The very reverse is manifest. Every year during
" these eight years he meditated a visit to Scotland,
" and every year, for some reason or another, it was
" put off. It is in allusion to these visits that he says
" he is to return, and it is during these visits that he
" expresses a wish to reside at Fowlis. Thus in 1797 he
" writes to his factor,—" the mill is not to work before
" ' my return to Ross-shire;' and certain articles will be
" paid ' when I return to Ross-shire.' In a letter to the
" same he writes that certain papers ' are to be sealed
" ' up, not to be opened till my return to Ross-shire.'

" But in other letters, at that very time, and relating
" to this intended visit, he says,—' I am not yet quite
" ' decided on my jaunt to Scotland.' He orders job-
" horses to be hired during his stay in Scotland; and
" in a letter to his agent, Mr. Mackenzie, dated the
" 13th October 1797, he says expressly,—' my stay in
" ' the country will be about six weeks, or to the end
" ' of December at the very latest.' Again, as to living
" at Fowlis Castle, he writes,—' It is my resolution,
" ' please God, to go early next summer into Scotland.
" ' I wish, if possible, to reside at Fowlis while I am in
" ' that country.'

" Then it is said that he expresses an intention of
" taking the management of his affairs in Scotland, and
" acting as his own factor, which is represented to infer
" an intention of constant residence in this country.
" But there is satisfactory proof in the very same letter
" that this was not his intention. It appears that he
" did take the management of his whole estate to a cer-

" tain extent from the year 1795 downwards, and gave " special directions in writing about every matter, how- " ever important or however trivial, from the letting of " leases and levying rents down to the custody of the " key of the meal chest and the disposal of empty packing " boxes. But all these directions were given year after " year for seven years, during which he was never " absent from London. With regard to the phrase " of being his own factor, observe how it is limited. " Writing to Mr. David Aitken in 1795, he says,— " ' When in the country, as I wrote you, I shall con- " ' sider myself as factor under your directions; when " ' I am here you will be factor under mine.' And in " another letter to the same person he says,—' I em- " ' brace this opportunity of informing you, that though " ' I propose being my own factor I shall, both when " ' in Ross-shire and here, refer the management of the " ' estate to you.'

" Occasionally he sent articles of furniture from Lon- " don to Fowlis Castle, but such articles must have been " requisite for the accommodation of himself and his " family, though he had contemplated a jaunt for six " weeks only, as he did in 1797.

" I may observe also, that the facility with which all " his projected annual visits for seven years were aban- " doned shows how much he was attached to a London " life.

" Even after his marriage, and after Lady Fowlis's " death, it may be remarked that he stayed only a few " years in Scotland, after which he returned to Lon- " don, retaining during the whole intermediate time his " house in Gloucester Place, which proves that even " then he had no intention of abandoning his London " domicile.

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" He revisited Scotland in 1817, and spent two or " three years in Ross-shire, when he finally left this " country, and hastened back to the scene which he " was fitted by his education, his habits and pursuits, " to enjoy, and where since that time (excepting some " short visits to the continent,) he has uniformly re- " mained. From the year 1794 then, when he first " established his domicile in London, to the present " day, he has, with the exceptions mentioned, been " constantly resident there, being a period of no less " than forty-three years, and there he continues. I " do not think there can be more conclusive evi- " dence to establish a domicile of choice, facto et " animo.

" The pursuer founds on a citation from the com- " mentator John Voet, and she says the general prin- " ciple of law cannot be better expressed than in his " words[1]:—' Illud certum est neque solo animo neque " ' destinatione patrisfamilias, aut contestatione sola, " ' sine re et facto, domicilium constitui: neque sola " ' domus commoratione in aliqua regione; neque sola " ' habitatione sine proposito illic perpetuo morandi, " ' cum Ulpianus a domicilio habitationem distinguat.' " But although Vattel has expressed himself to nearly " the same purpose, I have no hesitation in saying, " that if at any time that was the rule of international " law, it is not so at present. The correct principle is " laid down by Professor Story in his excellent work " on the Conflict of Laws.[2]—' Vattel has defined domi- " ' cile to be fixed residence in any place with an " ' intention of always staying there. But this is not " ' an accurate statement. It would be more correct

[1] Voet, 5, 393. [2] Page 42.

" 'to say, that that place is properly the domicile of " 'a person, in which his habitation is fixed, without " 'any present intention of removing therefrom.' It " is possible that Sir Hugh Munro, besides his inten- " tion of making short visits to Scotland, may have " contemplated at some future and indefinite period of " life, to take up his abode in Ross-shire. But that is " not enough. The same author observes [1], that 'if a " 'person has actually removed to another place, with " 'an intention of remaining there for an indefinite " 'time, and as a place of present domicile, it becomes " 'his place of domicile, notwithstanding he may enter- " 'tain a floating intention to return at some future " 'period.' Can it be maintained that Sir Hugh " Munro at the time of his marriage, or at any " other time during the last forty-three years, is proved " to have had more than 'a floating intention' to " settle himself permanently in Scotland?

" Two cases have been cited for the pursuer; that of " the Earl of Strathmore's son in the House of Lords, " and that of Lord Sommerville's succession in the Court " of Chancery. The case of Strathmore does not bear " upon this question at all; for it was admitted on both " sides, from the outset, that Lord Strathmore's domi- " cile was in England. Lord Sommerville's case agrees " with this case in two particulars. Lord Sommerville as " well as Sir Hugh Munro had a Scotch domicile of " origin, and both had houses in Scotland and in Lon- " don. But in every other circumstance the cases are " exactly opposed to each other. Lord Sommerville's " time was equally divided between Scotland and Eng- " land. He lived one half of the year in London, and

[1] Page 45.

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" the other half in Mid-Lothian. In Scotland his " establishment and style of living were suitable to his " rank and fortune. In London he had only one or " two female servants, and brought two men servants " from Scotland, taking them back with him when he " returned, and using job horses in London occasion- " ally. In his manner of living in London he was very " private; seeing no company, dining usually at a club, " and keeping his servants on board wages. His house " in London was out of repair. On the contrary, Sir " Hugh Munro at the time of his marriage, being the " period in question, did not divide his time between " Scotland and England, but spent the whole year in " London. He kept up a constant establishment in " London; in Scotland he had no establishment what- " ever. In England Sir Hugh Munro's style of living " was suitable to his rank and fortune; in Scotland he " had only two female servants to take care of his " house. When he contemplated a visit to Scotland " every year for eight years, he intended to take his " own servants with him, and to bring them back to " England, and to use job horses occasionally in Scot- " land. When he did visit Scotland, but after the " period in question, he lived very privately, seeing " little company; and his house was, as it always had " been, out of repair.

" On these grounds I have come to the conclusion " that, Sir Hugh being domiciled in England at the " date of his marriage with Lady Munro, the pursuer " remains illegitimate. My opinion, in point of law, is " the same with that of Lord Gillies and Lord Mac- " kenzie. On the fact, I agree with the majority of the " consulted Judges.

" With regard to the case of M'Douall, it is ad-

" mitted that the domicile of Colonel M'Douall was in " Scotland. He went to England with his regiment; and " it is laid down in all the books, that a person absent " on military service retains his previous domicile. " Further, I am inclined to think, that the lady whom " he married in England retained her Scotch domicile. " She went with the Colonel to England, and while " there had illegitimate children born to him, whom " he wished to have educated in England. The " Colonel took a house for them at Penrith for that " purpose; and I consider the lady as a part of his " family, and acting as the governess or superintendant " of his children while there. It is laid down in the " Roman law, that men-servants and maid servants " (famuli et ancillæ) follow the domicile of their mas- " ter; and on that account I think this lady, as the " governess of Colonel M'Douall's children, retained " her Scotch domicile. But at the same time, in my " opinion, Mrs. M'Douall's domicile, at the period of " her marriage, is a matter of no consequence what- " ever. On the principle stated in the preceding case " of Munro, I conceive that the moment the marriage " took place Colonel M'Douall's domicile became the " domicile of the lady and her children; and at the " same moment the children had the benefit of the " Scotch law of legitimation."

Lord President.—" Bruce[1] was held domiciled else- " where, although actually on his passage home."

Lord Corehouse.—" Persons going to the East or " West Indies from this country, with the view of " making a fortune, have for the most part a fixed " intention of returning home when their fortune is

[1] Bruce v. Bruce, post, p. 600.

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" made. I know but of one instance of a gentleman " who realized a large fortune, and who had retired " from the public service, but who resolved to end his " days on the banks of the Ganges. There is a series " of decisions, both in our own and the English books, " among the rest that of Bruce, to which your Lordship " alludes, in which persons in the civil service in India, " though they had expressed a decided intention to " return to Britain, and had taken steps for that " purpose, were held to have had an Indian domicile."

Judgment of Court. 15th Nov. 1837.

Thereupon their Lordships, 15th November 1837, pronounced the following interlocutor:—" The Lords " of the First Division having resumed consideration of " the pleadings, and whole procedure in this case, " and heard counsel, and having also considered the " opinions of the consulted Judges, in consequence " thereof, sustain the defences, assoilzie the defenders " from the conclusions of the action, and decern; find " no expenses due to either party."

The pursuer appealed.

The preceding case of the Countess of Dalhousie v. M'Douall and the present case were, successively, heard before the House. Both cases were disposed of by one judgment of their Lordships, and the arguments in both cases on the general questions involved were similar.

Argument for Legitimacy.

Appellant in Munro v. Munro, and Respondent in Countess of Dalhousie v. M'Douall.—Legitimation per subsequens matrimonium is a settled rule of positive law in Scotland. It is of general application, and is so stated without qualification or restriction. According to that rule " the bairnis gottin or born befoir the completing

"of the marriage ar legitimat and maid lauchful, and "thairfore may succede as richteous air to their pa- "rentis."[1] The only requisite to the retroactive operation of the rule is, that the child shall be born of a mother whom the father at the time of procreation and birth might lawfully have married.[2] It confers a status which the child cannot repudiate, for even if the child predecease the marriage of the parents, but leave issue, the right of legitimacy will enure to the grandchild.[3] All parties subject to the law of Scotland, and having the privileges of domiciled Scotchmen, are alike entitled to claim the benefit of this rule. Such is the effect given to it over the greater portion of the civilized world where legitimatio per subsequens matrimonium prevails.[4] As the legitimacy of the child is a right derived through the marriage of the parents, the proper subject of inquiry, in case of doubt, is, what are the rights as regards domicile of the parents so marrying? If the husband have a Scotch domicile, that of the wife must also be held to be Scotch[5]; hence the matrimonial domicile, that is, the domicile of the husband, becomes the true test in such a question.

The matrimonial domicile is not necessarily to be

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[1] Balfour's Practicks, p. 239; Craig, Jus Feud. lib. 2. dieg. 13. s. 16.

[2] Stair, b. iii. tit. 3. s. 42; Erskine, b. i. tit. 6. s. 52; Bankton, b. i. tit. 5. s. 54; Spottiswoode, 27; Vinnius ad Instit. lib. i. tit. 10. s. 13; 3 Pothier, 327; Lord Robertson in Edmonstone v. Edmonstone, 1st June 1816, Fac. Coll.; Lords M'Kenzie and Medwyn in Rose v. Ross, 5 Shaw & Dunlop, 579, (new edition,) and 4 Wilson & Shaw's Appeals, App. p. 59.

[3] 3 Poth. 328; Bank. b. i. tit. 5. s. 58; Lord Meadowbank (citing his notes of Baron Hume's Lectures), 5 S. & D., 594; Voet, b. xxv. tit. 7. s. 7.

[4] 1 Burge, Com. on Foreign and Colonial Laws, p. 101.

[5] Warrender v. Warrender, 2 Shaw & M'Lean, 154; Lord Eldon, cited in Robertson on Personal Succession, 428.

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held as being in the country where the celebration or declaration of the marriage takes place, and therefore the locality of the marriage is not decisive, although, if it be a good marriage in the place of celebration, effect will be given to it elsewhere.[1] On the contrary, it has been held, that although the marriage take place in Scotland, England may be the matrimonial domicile [2]; or, the marriage may be in England, and yet Scotland, as the domicile of the husband, drawing with it that of the wife, be held to be the domicile of the marriage, communicating all the rights and incidents of a Scotch marriage.[3] So far has this principle been sanctioned, that it has been held that the condition of parties marrying in England, and removing into Scotland, and becoming domiciled there, must be governed in all respects by the law of Scotland.[4] On the same ground the cases of Sheddan v. Patrick[5] and the Strathmore Peerage[6] were determined; the matrimonial domicile being respectively in America, and in England, and not in Scotland; and therefore in neither case was the marriage held to be Scotch, so as to entitle the parties, though claiming rights of property in Scotland, to the benefit of the Scotch rule of law. The effect of the matrimonial domicile, as sanctioned by the laws of

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[1] Lord C. Lyndhurst, in Rose v. Ross, 4 Wilson & Shaw, 299; 1 Boullenois, Traité de la Personalité et de la Realité des Loix, 62; King v. Inhabitants of Brampton, 10 East, 282.

[2] Rose v. Ross, ut sup. [3] Warrender, ut sup.

[4] Hog v. Lashley, 7th June 1792, Bell's Cases, 491, and in Robertson's Per. Suc. 449; Vattel, b. ii. tit. 8. s. 14, p. 175, 4th edit.; Story's Conflict of Laws, ch. vi. s. 193, 194; Edmonstone v. Edmonstone, ut sup.; Warrender, 2 S. & M. 154. 220. 234. 239.

[5] 1st July 1803, Fac. Coll.; Mor. voce Foreign, App. No. 6. Affirmed, 3d March 1808, Lords Journals, xlvi. 464.

[6] 5th March 1821, 4 W. & S. App. n. 5, p. 89.

other countries, is illustrated by the case of Comté du Quesnoy.[1]

The locality of the child's birth in a question of legitimation is unimportant. The status conferred on antenati by the marriage of the parents being the matter for determination, the accident of the place of birth does not exclude a child born illegitimate from having communicated to it a right, which the law, by the force of the subsequent marriage of the parents, imparts generally to children previously begotten by the parents. This principle of the marriage drawing back to a period prior to the birth is one of municipal as well as of international law, and is recognized by legal writers as an universal consequence of the subsequent marriage.[2]

Indelibility of status, whether founded on alienage, or status fixed at birth,—even if that were the law in England,—cannot impede the operation of Scotch law in a case purely Scotch. The doctrine of allegiance does not exclude the attainment of rights in another country by native-born subjects. No doubt, the place of birth de-

[1] Mr. Burge (vol. 1. p. 106.) thus notices the above case as reported in the *Journal des Principales Audiences du Parlement.* Guessiere, tom. 2. liv. 7. c. 7. "Jeanne Perrone Dumay, a native of Flanders, had a son by "the Comté du Quesnoy, a native of Picardy. After the birth of this "child the parents went to England, and were there married, and the "question was, Whether the son was to be considered legitimate by the "law of France, and entitled to succeed to the property of his deceased "father in that country?—It was decided, on appeal, that he retained his "original status or capacity to become legitimated by the subsequent "marriage of his father and mother, and that the place in which that "marriage took place was material only as regarded the solemnities which "constituted its validity; but with respect to its civil effects, the laws and "customs of the domicile of the contracting parties were alone to be "considered."

[2] Boullenois, p. 62; Merlin, Repertoire, tit. Legitim., sect. 2. s. 11. p 865.

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termines the question of allegiance, and there may be allegiance sub modo to different Crowns; but if the laws of a country not that of the child's birth, but of its paternal domicile, give to it certain privileges, the allegiance due to the land of its nativity does no where enjoin the rejection or denial of the privileges so acquired. Indelibility of status can only mean that the law of England does not recognize legitimation per subsequens matrimonium. The English law may hold by the doctrine of indelibility for its own purposes, without sanctioning in the least the extension of its own rule to other countries. Nay, in England, indelibility has no place as a fixed rule of permanent exclusion; as, for instance, it has always been law in England, though not till recently[1] in Scotland, that a bastard may make a will; also that a bastard may benefit by the rule, as to bastard eigné and mulier puisné. Besides, while it holds that there is an incapacity by one born before actual marriage to take, by descent, land in England, it recognizes, in the same individual, the status of personal legitimacy, as conferred by the subsequent marriage of its parents while domiciled in Scotland; such being the opinion of Judges in Birtwhistle v. Vardill.[2]

Indelible illegitimacy is as repugnant to the law of Scotland as is indissoluble marriage, and there is no authority to support it. When the case of the Strathmore Peerage[3] was decided in this House, Lord Redesdale, with reference to the case of Sheddan v. Patrick[3], and on the supposition that the marriage in it had taken

[1] 6 W. 4. c. 22.

[2] Opinion of Alexander, C. B., and Judges, in 5 Barn. & Cress. 438; and see also result of that opinion confirmed by opinion of Judges, delivered by Tindal, C. J., on 20th July 1840, Appendix, postea.

[3] Ante, p. 586.

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place in Scotland, asked whether that would have legitimated the issue? His Lordship said[1] he thought it was not necessary to go into that question, but added, "But I must say that I cannot conceive how it could "have that effect." If his Lordship referred to the mere act of celebration of the marriage, it is difficult to conceive how the celebration taking place in Scotland should create any difference in the result. Assuming the domicile of the husband to have been still in America or England, and that such foreign country was the contemplated domicile in which the contract was to receive implement, although the validity of the marriage, in so far as regarded its form, would be determined by the law of Scotland, its qualities and incidents would be regulated entirely by the law of the domicile; or, in other words, though solemnized in Scotland, it would be deemed an English or an American marriage, as the case might be, and would possess only the qualities and incidents of such marriage. Consequently, legitimation of issue previously born not being an effect allowed to marriage by the laws of these countries, it is clear that there would be as little room for maintaining that the issue was legitimate in such case, as where the solemnization had been within their proper territory; the locus of solemnization, except as to the forms of the contract, being, per se, of no consequence. On the same assumption of the father's domicile being in America, or England, the issue could not by the marriage acquire a Scotch domicile, so as to become subject to the operation of the law of Scotland. Their status would thus necessarily continue to be judged of by the law of the country

[1] 4 W. & S., App. p. 94.

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in which they remained domiciled, and according to that law their illegitimacy was indelible. In this view the observation of the learned Lord is strictly accurate; but its meaning is not, that even if the father had been domiciled in Scotland, and had married there with a view to permanent residence in that country, the case would not in any degree have been different from that which actually occurred in the causes of Sheddan and of Strathmore. No such opinion on an unargued point could have been intended to be given; and it is of importance to remark that Lord Lyndhurst, when moving the judgment in the case of Rose v. Ross, referring to this dictum of Lord Redesdale, while he expresses[1] his concurrence in the observation of that noble and learned Lord, "that it was not necessary" to go into the question of what the effect would have been had the marriage taken place in Scotland, avoids extending that expression of concurrence to the concluding portion of the sentence, "but I must say that I do not conceive how it could "have that effect." The Lord President[2], in delivering his opinion (in Munro v. Munro), has fallen into the mistake of supposing that this remark was Lord Lyndhurst's own observation. His Lordship, after mentioning Lord Lyndhurst's quotation from Lord Redesdale's speech, proceeds, "Then Lord Lyndhurst himself adds, "'I agree with the noble and learned Lord. I do not "'think it necessary, but I must say I do not conceive "'how it could have that effect.'" Now, in truth, Lord Lyndhurst pauses in his quotation, to express his agreement with the opinion, that it was not necessary to decide the question, and then goes on with the quo-

[1] 4 W. & S. 296–7.

[2] Ante, p. 554.

tation, "but I must say," &c., evincing in the most marked manner that the expression of his concurrence was limited to the opinion, that it was not necessary to decide the question. This is perfectly obvious from the passage referred to, which is as follows[1]: "These are the "observations the noble and learned Lord makes, 'I "'do not enter into the question whether, if this mar-"'riage had been celebrated in Scotland it might have "'had the effect of legitimating the child, because I "'think it is not necessary;'—I agree with the noble "and learned Lord—I do not think it necessary,—'but "'I must say that I cannot conceive how it could have "'that effect.'" His Lordship adds no concurrence to this part of the opinion.

This is a question juris gentium, and the opinions of foreign jurists are conformable with those of the majority of the Judges on the abstract point of legitimation.[2] Boullenois[3], in the case of foreign parties coming to France, and becoming naturalized, equivalent to gaining a domicile in that country, says, that whether the marriage takes place before, or after the migration of the family into France, the children by the force of naturalization become legitimate in France. By naturalization "ils sont rendus participants de tous les "droits ordinaires et de droit commun de la nation," and legitimation per subsequens matrimonium being "un droit admis dans nos mœurs par la jurisprudence," it is one "dont les etrangers naturalizés doivent jouir "ainsi que touts les autres sujets du roi."

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1 4 W. & S. 297.

2 Huber. de confl. leg., lib. i. tit. 3. s. 13; Story, c. 4. s. 57, citing Boullen.; Pothier, Cout. d'Orleans, c. 1. art. 1. s. 12 & 13; Story, c. 4. s. 64, 65, 69, 70; ibid. c. 7, s. 224; ibid. c. 2. s. 22.

3 1 Boullen., 62.

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Besides, the Scotch Court is bound to enforce the lex fori rei sitæ, a question of succession to Scotch heritage being at issue.[1]

Sir F. Pollock (in M'Douall's case) objected to this argument, — that a question of personal status, and purely consistorial, was alone raised by summons.

The Lord Advocate, in answer. — The original summons on which a record was made up contains conclusions as to the right of the party as heir of entail, and the appellant in her case in the Court below (p. 23, Appellant's Case) asks the Court to find "that the succession to the entailed estates of Bankton, &c. has "opened to her."

Sir F. Pollock. — The pursuer may, under a proper form of action, make out his right to the Scotch estate by virtue of some municipal rule affecting heritage in Scotland, and nevertheless fail now in establishing general legitimacy. As in Birtwhistle v. Vardill there was general legitimacy with a particular incapacity to take, so here, it is contended, that there is general illegitimacy coupled, it may be, with a particular capacity to take. [*Lord Chancellor.* — The Court only dispose of the conclusions as to the pursuer being the legitimate son of his father.]

Mr. Pemberton and *Sir W. Follett* (in Munro v. Munro) adverted to the conclusions of the summons, as differing from those in the preceding case, and as asking declaratory findings on matters of fact decisive of the appellant's right to succeed. These facts being so established, there is the most conclusive authority afforded by the analogy of Birtwhistle v. Vardill that

[1] 1 Burge, 109, 110.

that the particular law of the country where the land is situated must prevail.

Supposing the place of birth had been important, then (in M'Douall's case) the period of conception would be important, as fixing the place and time to which the subsequent marriage would draw back.[1] Tempus nativitatis referred to in the adverse authorities is not put in opposition to time of procreation; for where it is for the benefit of the child, its status beyond the period of birth is looked to.

The domicile of the mother anterior to the marriage was also irrelevant. Even if it were otherwise, (in M'Douall's case) the domicile of the mother being Scotch was, according to the adverse argument, communicated to the child, and thus the child's domicile of birth was transferred, as that of a minor may be, by consent of the mother, to Scotland.[2]

The domicile of the husband being thus the important question, the state of the fact clearly supports the legitimacy, the domicile of Scottish origin continuing in both cases.[3] There was absence from Scotland without the intention of abandoning the old, or acquiring a new domicile. There was no departure sine animo revertendi, "sans esprit de retours." Where there is merely residence out of Scotland, whether from public duty, or temporary detention, the animus remanendi does not arise. The cases put adversely are those of parties giving up a Scotch domicile of origin

[1] Cod. lib. v. tit. 27. l. 11; Dig. lib. 6. tit. 5. c. 5. s. 2; Erak. 1. 6. 52; Erskine's Principles, p. 505; Bankton, b. 1. t. 5. § 3. n. 57. and b. 3. t. 3. § 4. n. 97; rule in (Le Marchant's) Gardner Peerage; 1 Burge, 94, 95, and authorities there cited.

[2] Potinger v. Wightman, 3 Meriv. 67.

[3] Lord Alvanley, M. R., in Sommerville v. Sommerville, 5 Vesey, 754.

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and acquiring by choice a new domicile. The mistake of the majority of the Judges (in Munro v. Munro) was, in supposing that the same circumstances are necessary in retaining, as in gaining a domicile; residence is not necessary to retain a domicile, so long as there is an intention to return; a person may travel for any length of time without losing his domicile. But residence, however short, and intention, are necessary to acquire a new domicile; there must be "le concours de la volonté "et du fait," and it cannot be acquired by residence, however long, without that intention.[1]

Argument against Legitimacy.

The Respondent in Munro v. Munro, and Appellant in Countess of Dalhousie v. M'Douall.—Legitimation per subsequens matrimonium being a rule of questionable policy, it ought not to be extended so as to reach circumstances which have never yet been made subject to its application, but ought to be strictly limited to cases where the children claiming legitimacy are the previous offspring born in Scotland, of Scotch parties subsequently marrying in that country. The true principle of the law of Scotland, in reference to the rule in question, renders it impossible to apply that rule, where the material incidents relative to the connexion between the parents of the child sought to be legitimated have taken place in England. The admitted exceptions, where the parties are not free to marry at the birth of the child, or where the parties are within forbidden

[1] 1 Burge, 41, citing Pothier, Introd. Gen. aux Cout. p. 4; D'Argentré Cout. art. 449; Toullier, liv. 1. tit. iii. n. 371; Dig. lib. 50. tit. 1. c. 20. See also 1 Burge, 54, citing Voet, lib. 5. t. 1. de Jud., § 98; Zanger. de Except., par. 2. c. 1. n. 12. et seq.; Menoch. de arbit. Jud., lib. 2. cent. 1. cas. 86. n. 5. et seq.; Resp. Jurisc. Holland, par. 3. v. 2. cons. 317.

degrees, or, till recently [1], the existence of an intervening marriage, prove the rule not to be of universal application.

The rule or custom of legitimation by subsequent marriage is neither of very ancient origin in Scotland, nor is there any case to be found on the records of the Commissary Court in that country, where a child born in England of parents afterwards married in England was held legitimate.

The status of the child is the proper subject of inquiry; the right, or privilege, or disability of birth, whatever it may be, is not that of the parents, and cannot be altered by any act of volition on their part. The domicile of the parents, whether at the birth or marriage, cannot affect the position of the child, which is fixed by the law of the country where it was born. The application of the law of domicile is attended with difficulty. Status may be held to be governed by domicile absolutely, or by the domicile of the party whose status is disputed at particular periods of his life. Questions as to the legitimacy or illegitimacy of an individual should be resolved by the rule that the status, once fixed, shall not be subject to capricious change. If legitimacy should be capable of being acquired, lost, and regained by every change of residence, the child's actual condition would be ascertained with difficulty, and its position remain doubtful. The rule of determining status by the law of the place of birth is of easy and certain application. There is no reason for preferring the matrimonial domicile. It may operate a change of the original domicile of the child,

[1] Kerr v. Martin, 6th March 1840, F. C.

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or it may not. If it do not so operate, it can have no effect on status; if it do, then future changes should have just as much influence. Legitimation of offspring is wholly independent of intention. If it were dependent on the wish of the parents at the time of the marriage, the fact of the marriage being in England would seem to prove that legitimation was not the object. No English child born out of marriage can be legitimate; if there be a subsequent English marriage, no legitimation can be produced, and so the legitimation of English-born bastards by subsequent marriage of the parents is beyond the presumption of Scotch law. Two certain tests in the application of legitimation by subsequent marriage would be afforded, either by resorting to the law of the country where the marriage actually takes place, or the law of the country where the child is born, and all conflict by the unequal application of the rule to native-born subjects of England would be obviated. The domicile of the father at the marriage, or matrimonial domicile, can only be preferable to the lex loci contractus of the marriage, as it affects the patrimonial rights and interests of the contracting parties, and the effect of the marriage upon the status of antenati is not necessarily dependent on the domicile of the father.[1] But clearly, the domicile of the mother of an illegitimate child, drawing along with it the domicile of the offspring, is exclusive of the application of a rule of law which is repugnant to the lex domicilii of both mother and child.

By international law, as the domicile of nativity must govern, the domicile of the child's birth forms the only

[1] Story, ch. 6. s. 125; Huber. lib. iii. 9; Hertius de Coll. Leg. s. 10.

proper subject of inquiry. For the qualities impressed upon a party by origin follow him every where.[1] The passages implying a contrary position, cited from Boullenois and Hertius, in the opinion of one of the Judges (in Munro v. Munro)[2] do not relate to universal status, but the capacity for particular acts.

The status of the child in both these cases was that of a native-born subject of England. So far as regards Scotland they are aliens to whom the law of England permanently became attached from the period of birth.[3] There cannot be a double allegiance; and the disabilities or burdens imposed by native allegiance cannot be removed or transferred by virtue of the law of another country, the subjects of which are not exposed to corresponding disabilities or burdens. The question must be viewed now, just as if it had occurred before the union of the Crowns, or in the reign of Elizabeth. Indelibility of status as regards bastardy being an admitted principle in England, the Scotch law cannot reach the case of children born under the jurisdiction of England. The principle which makes the status of a child to be fixed by the place of its birth, and the law of the country then affecting it, as to its condition of legitimacy or illegitimacy, and as to its capacity for legitimation, has been recognized in three successive cases before the House, viz. Sheddan v. Patrick, the Strathmore Peerage, and Rose v. Ross. Although it has been said that the precise point was not necessary to be de-

[1] Bartholus ad cunctos populos Cod. de Sanct. Trin.; Louet Arrets, Nov. c. 42; Huber. de confl. leg., prel. pars 2. l. 1. tit. 3; Bouhier, Observ. sur la Cout. de Bourg. p. 418, s. 6; Boullen. Tr. de la Pers. 10; ibid. i. 53; Merlin, Repert. voce Legitim; Story, c. 4. s. 93; 1 Burge, 3.

[2] Lord Corehouse, see ante, p. 571.

[3] Blackst. b. i. tit. 16. s. 2. p. 454.

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cided, still the opinions then expressed claim that consideration, which the conclusiveness of the reasoning contained in them entitles them to. In the Strathmore Peerage, Lord Redesdale held, that where a child is born in a country where the illegitimacy is indelible, that in any country would have the effect of rendering such child illegitimate. In the case of Rose v. Ross, Lord Lyndhurst, Chancellor, in proposing judgment, said[1], "It is sufficient that the child be born in a "country where the illegitimacy is indelible; that in "any country whatever would have the effect of ren- "dering the child illegitimate. I collect that opinion "to have been expressed in the case of Sheddan v. "Patrick. I collect this also from the judgment of "Lord Redesdale in the Strathmore Peerage, where "the noble and learned Lord commented upon the "case of Sheddan v. Patrick; and I believe at the time "when Sheddan v. Patrick was decided in this House "that noble and learned Lord was a member of it." And again, "Taking the whole of the judgment of the "noble Lord together, I should conclude that he was "of opinion that if the child was illegitimate at the "time of his birth, and according to the law of the "country where it was born, that character was stamped "upon it indelibly. No subsequent marriage could "render him legitimate." Lord Eldon apparently concurred, and Lord Wynford coincided, with Lord Lyndhurst.

And if the place of birth be so important, the alleged conception of the child in a country that does sanction legitimation by a subsequent marriage would not avail

[1] 4 W. & S. 296.

the party. For the place of conception is immaterial, except in cases of liberty or slavery; and there is no case to show that the fact of procreation in England of a child born abroad affects its status. The best authorities show, that the tempus nativitatis, and not of conception, is looked to[1]; and that a woman being pregnant in England, yet if her child be born abroad it is an alien.[2]

In ascertaining a disputed domicile, the admission that a party may be absent from his native country on public duty, or on foreign travel, is not conclusive against the possibility of the fact so being, that the party going abroad,—not having had any fixed house or residence, but settling afterwards for years in the land of his new residence and choice,—may be presumed as intending to acquire, as he has in fact established, a new abode or domicile. It is not essential to the constituting a domicile that there shall be a positive resolution or intention to abandon for life the old, and to live constantly in the new residence. The acquiring a new domicile in England by constant and fixed residence for years there, and by being occupied in business or other pursuits, which can alone be prosecuted as an occupation in the new domicile, is perfectly compatible with the occasional exercise, by correspondence or otherwise, of the rights of proprietorship in another country, which has been long abandoned as a domicile. More especially is this true, where the new place of abode has become the principal and only residence, while a house in the old domicile is

[1] Sanchez, de Matr. obs. 141, p. 582; 6 Christinæus, Decis. 82; Dig. lib. i. tit. 5. l. 7.; lib. xxv. t. 4. l. 1. § 1.; lib. xxxv. t. 2. l. 9. § 1.; Warnkœnig, Juris Rom. privati, Com. 178. Cod. de Natural, lib. 5. t. 7. l. 10.; Novel. 12. c. 4. Novel. 89. c. 8.; Stryk. Diss. c. 2. § 51.; Merlin, tit. Legitim., sec. 2. § 3.

[2] 1 Ventr. 427. (Lord Hale's Arg.); Comyn, Dig. vo. Alien.

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merely fitted up for a short and uncertain visit. The purpose which actually may detain the party in his new residence may not have emerged at the time of leaving the former abode, and yet that purpose may become a settled plan, put all intention of returning out of the question, and lead to a fixed domicile, adopted by the free will of the party. Sir William Scott in the case of the Harmony [1] said, "If the purpose be of such a nature "that it may probably, and does actually, detain the "person for a great length of time, I cannot but "think that a general residence might grow upon the "special purpose." The mere "floating intention" to return is not sufficient in any case, and, in a question of evidence, it would be held to be counterbalanced by proof of actual residence in the new domicile by a party capable and free to act for himself, and whose actions are the best interpreters of his intention.'

Judgment deferred.

The following opinions were delivered in the cases of Munro v. Munro, and Countess of Dalhousie v. M'Douall, which were put down for judgment together:—

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords. In these cases the first point to be considered, is the rule of law in Scot-

1 4 Donat. 424; Code Civil, § 102–3; Bruce v. Bruce, 15th April 1790, (affirmed) Bell's Ca. 519, Mor. 4617. and in Rob. Pers. Suc. 119. 183; Ommaney v. Douglas, March 1796, ibid. 152. 470, 471; S. C. in 6 Bro. Ca. in Parl. 550; Bempde v. Johnstone, and Graham v. Johnstone, (Annandale case,) 3 Ves. 198; Lord Stowell in case of Harmony, 2 Robinson, Adm. Rep. 322; Stanley v. Berners, 3 Hagg. 476–7; Munro v. Douglas, 5 Madd. 379; Voet, ad Pand. lib. v. t. 1. l. 98; Putnam v. Johnstone, 10 Massachusset Reps. 501; Story, c. 3. s. 46. p. 45.; Dig. lib. l. tit. 1. l. 4.; Balfour v. Scott, 6 Bro. Ca. in Parl. 550.

Note.—See further, as to the application of Lord Alvanley's rule in regard to domicile, the recent case at common law of Attorney General v. Dunn, 6 Mees. & Wels. 511; and De Boneval v. De Boneval, 1 Curteis, 856, in the Ecclesiastical Court.

land as to the effect of a subsequent marriage of a domiciled Scotchman upon the issue of the parties born before the marriage, when the birth of such issue, and the ceremony of marriage, took place out of Scotland. Not that all those circumstances occur in the case of Lady Dalhousie v. M'Douall, but as they do in the case of Munro v. Munro, it will be convenient to consider the whole of the proposition.

To whatever principle the law of legitimation per subsequens matrimonium be attributed, there can be no doubt of the generality of the rule, where the parents were capable of contracting marriage at the birth or conception of the child. Wherever, therefore, a marriage follows the birth of children procreated of the parties to the marriage, the requisites concur which are required by the terms in which the rule is laid down, —assuming always that the circumstances are such as to bring the case within the operation of the law of Scotland. And, as the laws of every country generally affect all those who have their domicile in such country, it would appear, that in order to bring any particular case within the rule of the law of Scotland, it would only be necessary to show that the domicile of the parents was Scotch.

This consideration is of much importance in a case in which it is said that no precedent can be found in which the particular facts of this case occurred; because if the case falls within the terms of the general rule, such general rule must govern it, unless it can be shown that there is principle and authority for making it an exception to the general rule, and withdrawing it from its operation.

The two circumstances relied upon for that purpose

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are, first, that the child was born out of Scotland, and, secondly, that the marriage took place out of Scotland. If it should appear that neither of these circumstances would, by itself, take the case out of the general rule, then, the union of the two cannot have that effect.

It was hardly contended that the country in which the marriage took place was material. It is considered as immaterial by the writers upon civil law. In Comté de Quesnoy's case, the marriage, although it took place in England, conferred legitimacy on a child whose domicile of origin was in France.[1] The law of the country where the marriage is celebrated ascertains its validity. The law of the country of the domicile regulates its civil consequences.

But, if the place of marriage be not material, still less can the place of the birth be so. The law of Scotland assumes that what in that country is considered equivalent to a marriage took place before the birth or conception of the child. If that be assumed, how can it be material in what country the child was born? This assumption is formed for the purpose of legitimatizing the issue. Why is it to be abandoned when it is peculiarly necessary for that purpose? If a domiciled Scotchman be in the habit, for business or pleasure, of passing part of his time across the border, and some of his children are born within and some without the limits of Scotland, — can it be the law that a subsequent marriage should legitimatize some only of his children? It has been assumed, in argument, that any of such children born in a country which allowed legitimation per subsequens matrimonium would be legi-

[1] 1 Burge, 106.

timate if born in Scotland, but not legitimate if born in England, or in any other country which did not recognize such legitimation.

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This argument is founded upon the supposed indelibility of bastardy, and seems to have its origin in some expressions of very learned persons; but it appears to me that this idea, as applicable to a Scotch marriage, has arisen from those learned persons having used expressions applicable to English law upon a question of purely Scotch law. If English parents have a child born in another country, could the legitimacy of such child in England be affected by any law of such country? The effect of a Scotch marriage must be judged of with reference to Scotch law, and that law not only does not admit the doctrine of the indelibility of bastardy, but, on the contrary, holds that no bastardy is indelible unless the parents were at the time of the birth incapable of marrying. If, therefore, the law of England be imported into the consideration of the question, the effect of the Scotch marriage is judged of, not by the law of Scotland, but by the law of England.

In this view of the law of Scotland all the learned Judges of the Court of Session concurred, with the single exception of the Lord President, who founded his dissent upon this rule of the law of England as to the indelibility of bastardy, and upon expressions of English lawyers; but he adds, "In the case of Ross I "stated in my opinion that I would not take the law "from such an extreme case as that of a woman taken "suddenly, and perhaps prematurely, in labour, whilst "travelling in England with or without her paramour, "and brought to bed of a bastard there, and then "returning with it on her recovery to Scotland. That

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"is an extreme case, and what might be the law as to "it we must endeavour to settle when the case occurs.[1]" Beyond all doubt a child so born would be affected with indelible bastardy in England, and if that is to regulate his status in Scotland the peculiar circumstances referred to would not make an exception in his favour.

For these reasons, and upon these authorities, if the question were to be decided upon the general principles of the civil law, or upon the law as established in Scotland, there would not, I think, be any difficulty in coming to the conclusion that the child of a Scotchman, though born in England, would become legitimate for all civil purposes in Scotland by a subsequent marriage of the parents in England, if the domicile of the father was and continued throughout to be Scotch. It remains to be inquired whether there are any authorities against such a conclusion.

In Sheddan v. Patrick[2] the question did not arise, because the father was domiciled in America. In that case, therefore, there was wanting that only circumstance, upon which rests the title of the child to claim the benefit of the law of Scotland.

In the Strathmore Peerage case[3], if it was not assumed that the domicile of the father was English, it certainly does not appear to have been proved to be Scotch,—Lord Eldon saying the domicile was principally in England; but the decision seems to have turned upon this, that the claim was to a British peerage. Whatever expressions may have fallen from Lord Redesdale, —for none can be found as coming from Lord Eldon,—

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[1] Ante, p. 559.

[2] 1st July 1803, Mor. ut ante.

[3] 4 W. & S. App. p. 89.

the decision of that case cannot be cited as an authority in a case respecting Scotch property, in which the domicile of the father was Scotch.

In Rose v. Ross[1] the domicile of the father was English. Lord Lyndhurst stated that as the ground of his opinion; and although the marriage was in Scotland, it was a marriage of persons having an English domicile, and coming into Scotland for the purpose of the marriage only. If that case proves any thing bearing upon the present, it is, that it is not the place of the marriage, but the domicile of the parties married, which regulates the civil consequences of the marriage.

For the same purpose, and for that only, the case of Warrender v. Warrender[2] has application to the present, because in that case it was assumed, and I think correctly, that for civil purposes in Scotland, a marriage in England of a domiciled Scotchman was to be considered as a Scotch marriage.

These decisions, therefore, do not establish any principle or lay down any rule inconsistent with the proposition, that the child of a Scotchman, though born in England, becomes legitimate for all civil purposes in Scotland by the subsequent marriage of the parents in England, if the domicile of the father was, and continued throughout to be Scotch.

If this be the rule of law in Scotland, it embraces the case of Munro v. Munro, and therefore includes that of Lady Dalhousie v. M'Douall, and renders it unnecessary to consider some of the minor points discussed in the latter case, such as, whether the mother had or

[1] 16th July 1830, 4 W. & S. 289.

[2] Ante, p. 585.

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had not lost her Scotch domicile? and, whether the fact of the conception having been in Scotland, might not of itself have led to a decision in favour of the legitimacy.

In both cases the question of fact remains to be considered, namely, what was the domicile of the father? In both cases, the domicile of the father was originally Scotch; and the question is,—whether he had at the time of the marriage lost this domicile of origin?—Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance, not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of England, but generally, by the laws of other countries. It is, I conceive, one of those principles, that the domicile of origin must prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord Alvanley in Sommerville v. Sommerville[1], and from which I see no reason for dissenting. So firmly, indeed, did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a new domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives. To effect this abandonment of the domicile of origin, and substitute another in its place, it required

[1] 5 Ves. 787.

" le concours de la volonté et du fait," " animo et facto;" that is, by actual residence in the place, with the intention that the place then chosen should be the principal and permanent residence, " larem rerumque ac " fortunarum suarum." There must be residence and intention; residence alone has no effect per se, although it may be most important as a ground from which to infer intention. Mr. Burge, in his excellent work [1], cites many authorities from the civilians to establish this proposition. " It is not," he says, " by purchasing and " occupying a house or furnishing it, or vesting a part " of his capital there, nor by residence alone, but it " must be residence with the intention that it should be " permanent." In all questions depending upon intention, difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished, by keeping steadily in view the principle which ought to guide the decision as to the application of the facts.

If, then, it be the rule of the law of Scotland that the domicile of origin must prevail, unless it be proved that the party has acquired another by residence, coupled with an intention of making that his sole residence, and abandoning his domicile of origin, I cannot think that there will be much difficulty in coming to a satisfactory conclusion, upon examining the evidence in these cases, with reference to this rule. In the case of Lady Dalhousie v. M'Douall there is really no difficulty at all; there is nothing in that case which can raise a question as to the father having abandoned the Scotch domicile. In the case of Munro v. Munro the difficulty is appa-

[1] 1 Burge, For. & Col. Law, 54.

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rently greater, because there was a residence in England of many years; but the only period to be considered is from the father's quitting Scotland in 1794 to the time of the marriage in 1801. There was a sufficient reason, independently of any intention of changing his domicile, for his leaving Scotland in 1794; his family house was not in a fit state for residence, and he had failed in effecting a proposed arrangement with his mother, by which he wished to obtain for his own use the house in which she lived. There is no ground for supposing that he, at that time, intended to abandon Scotland; the reverse is proved by the first letter he wrote after his arrival in London (3d September 1794), in which he gives directions about keeping some land in grass,—"the only farming" he takes "pleasure in;" and about clothes presses for his dressing-room at Fowlis. In November 1794 he accepted the office of deputy lieutenant for Ross-shire. In 1795 (9th February) he gave directions for the preparation of a will in the Scotch form; and in a letter of the 14th June he states his intention of being in Ross-shire at the end of the month; which, by subsequent letters, it appears he was prevented doing by an attack of illness. He, in a letter of 1st September 1795, expresses his regret at having been prevented going to Scotland; and in a letter of the 14th September he says he shall be there early next summer; and in a letter of the 18th he says he shall, after Whitsunday next, take the management of his estate entirely into his own hands. Similar expressions occur in many letters of 1795 and 1796; he says, "I "shall be in Ross-shire next year,"—"and should un- "foreseen events oblige me to defer my journey" &c.; and in a letter of the 27th October he directs the payment

in kind of hens and eggs to be continued, saying, "when at home I shall have occasion for them." Many letters in 1797 speak of his intended journey to Scotland, and in one of the 25th November 1797 he says, "My journey to Ross-shire, so long and often retarded "by circumstances which I could not foresee, is now, "by the advice of my friends there, given up till next "summer."

It appears that before this time, that is, in 1794 or 1795, the connexion between the appellant's father and mother had been formed, and she was born in 1796, which may well account for the continued postponement of his journey to Scotland; but he does not appear ever to have abandoned the intention, for in a letter of the 28th March 1798, to his factor in Scotland, he says that he expects very soon to be able to write to another person the time at which he proposed himself the pleasure of seeing him. In 1799, 1800, and 1801 he gave directions for the fitting up of his family residence in Scotland, and for that purpose sends large quantities of furniture from London. In September 1801 he marries the appellant's mother, and by a letter of the same year speaks of his intention of coming to Scotland. In a letter of the 25th April 1802 he says, "I have resolved to be at "Fowlis as soon as the house, which is painting and "papering, can be inhabited; but as these things do "not depend on my wishes, I cannot fix positively any "time. I hope to be in Edinburgh in July or August.' He accordingly went to Scotland in that year with his family, and resided in his family house at Fowlis, and there continued till 1808; the appellant's mother having died there in 1803.

Lord Corehouse, who entered much into this part of

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the case, in commenting upon the correspondence, asks[1], "Do these expressions, when read in connexion with "the context, import that he was to return to Scotland "with a view to settle permanently there, and to live at "the castle of Fowlis during the rest of his life? The "very reverse is manifest." And then he observes upon expressions used indicating that the promised visit to Scotland would be short. Those observations would be highly important if the question was, whether by his subsequent residence in Scotland he had acquired a new domicile there; but they do not appear to me to touch the question, whether he had abandoned his domicile of origin in that country; a question which can only be affected by evidence of an intention to do so. If he ever formed such an intention, to what period is the adopting that resolution to be referred? To be of any effect upon the present question it should be at some time prior to September 1801, the date of the marriage.

That he took a lease of the house in Gloucester Place, and formed an establishment there, has been much relied upon, and in the absence of better evidence of intention as to his future domicile, that might be important as affording evidence of such intention; but cannot be of any avail, when, from the correspondence, the best means are afforded of ascertaining what his real intentions were. The having a house and establishment in London is perfectly consistent with a domicile in Scotland. This fact existed in Sommerville v. Sommerville and Warrender v. Warrender. Taking, therefore, the rule of law as to the domicile of origin to be what I have before stated, and applying the evidence to that rule, I do not

[1] Ante, pp. 577, 578.

find it proved that the appellant's father acquired a new domicile in England, with the intention of making that his sole residence, and abandoning his domicile of origin in Scotland.

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If that be a correct conclusion from the evidence, it follows that the appellant in Munro v. Munro, being the child of a domiciled Scotchman, had, at the moment of her birth, a capacity of being legitimatized by the subsequent marriage of her parents for all civil purposes in Scotland, and that she accordingly, by their subsequent marriage in 1801, became legitimate, and as such capable of succeeding to the property in question.

The consequences of the opinions I have expressed are, that I propose that your Lordships do affirm the interlocutor appealed from in Lady Dalhousie v. M'Douall, with costs; and reverse the interlocutor appealed from in Munro v. Munro, and remit that cause back to the Court of Session, with a declaration that the pursuer (appellant) is the lawful daughter of Sir Hugh Munro.

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LORD BROUGHAM.—My Lords, I had not the good fortune to be present when these two cases were argued, and therefore were the question one of an ordinary kind I should not have expressed any opinion whatever. Nevertheless, from the part I have so frequently taken in cases of this kind, — a reference to which has been made in disposing of the present cases, both in the Court below and by my noble and learned friend in delivering judgment here,—I think it right that I should not suffer the decision of the House to be come to without saying a few words.

There are two questions for the consideration of your

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Lordships, as there were for the consideration of the Court below. The first is,—Whether, supposing the domicile of the parties at the time of the marriage to have been in Scotland, that marriage had the effect of legitimatizing issue born in England before the marriage, with reference to the question raised before the Scotch Court, as to the title of the party to be considered an heiress of tailzie to a Scotch heritable estate, quasi an estate tail, as one of the children of the heir of entail then in possession of that estate? The next question is,— Whether the domicile was English or Scotch?

On the first of these two questions, it is no doubt fit to observe, that it is at present for the first time undergoing decision. It has frequently been mooted in argument by text writers,—in discussions at the bar,—and occasionally by learned Judges arguing on the bench; but up to this time no decision has ever been made, either in Scotland or here, upon the point, namely, whether legitimization is effected by the subsequent marriage of the parents of a child born out of wedlock, that child being born in a country where no such law holds,—but the parties although living in that country, yet of course, at the time of the marriage, domiciled in Scotland, where the question arises touching the succession to real estates in Scotland. The question is now to be decided for the first time one way, having been disposed of in Scotland, upon the fact only, the other way; because as I shall presently observe, and it is with great satisfaction I state it, the great majority of the learned Judges in the Court below who dealt with the question of law came to the same conclusion as that to which I trust your Lordships, on the recommendation

of my noble and learned friend, are now about to come; but they did not feel themselves called upon to decide the case on that point. It is needless to add, that this decision does not run counter to the whole of the previous authorities, but, as far as any decision approaches the present case, all the weight of authority is in favour of the judgment, for the current of authority sets in clearly in that direction.

I have now to remind your Lordships of the weight of judicial authority in the Court below upon this question, in order that it may be by no means supposed, that because your Lordships are reversing the judgment, you are laying down principles of law contrary to the opinion of the learned Judges, from whose decision the appeal comes.

The five learned Judges who formed the majority of the consulted Judges, and whose decision you are about to reverse,—but to reverse on the ground of fact,—those five learned Judges in the first part of their statement seem rather to save the question. They seem not to dispose of the question, but give afterwards a very plain opinion in the affirmative. They state in the first place, on the supposition of Sir Hugh being a domiciled Scotchman: "Even upon this supposition, "however, we think the pursuer must have had diffi- "culties to encounter which have not yet been resolved "by any clear authority in the law of either country. "Some of the data in the ultimate decision of the "cases of Sheddan, Strathmore, and Ross, seem to "point to a conclusion against her, while others of "the very highest authority, in the more recent case "of Sir George Warrender, have rather a contrary "bearing. But holding as we do, that the domicile

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" of the husband was also English, we humbly con-
" ceive that there is no authority on which the claim
" of the pursuer can be supported."[1] Had it stopped there, I should have said as I did some time ago, that their Lordships being of opinion that the fact of the Scotch domicile was not established, they had no occasion to dispose of the question of law at all, as the question of law did not arise unless the fact of the Scotch domicile was proved. But what follows seems clearly to intimate that those learned Judges were of the same opinion upon the point of law with the minority, although they differed from them in point of fact; for they say[2]: " The law therefore, under which
" they themselves intended to live as married persons,
" may very well be allowed to settle the extent of their
" rights and duties as with each other, but cannot affect
" the condition of the children previously born, which
" we think must be determined by the law of the coun-
" try, where the parents were domiciled at the birth
" and the marriage. If the domicile were not the
" same for both parents at these two periods, we should
" hold that that of the father at the time of the mar-
" riage should give the rule; but as they were the
" same in this case, the question does not arise." Agreeing clearly upon the point of law with the majority of the learned Judges, although they differed in point of fact, the Judges of the First Division all agreed, with the exception of the learned Lord President. Lord Corehouse, who differed upon the question of fact, delivered a very clear judgment upon the point of law; but, with the exception of the learned

[1] Ante, p. 503.

[2] Page 504.

Lord President, all the Judges of the Court below agreed that the subsequent marriage of the parents would render legitimate the issue before marriage, provided the parties were domiciled at the time of the marriage in a country, the law of which recognizes legitimation per subsequens matrimonium.

The learned Lord President has given a very able and, in my opinion, striking judgment; striking rather from that manly straightforwardness which characterizes all the judgments of that right honourable and learned Judge. He has applied himself to the question, and has entered into an argument which had a very considerable effect on my mind when I first came to read it; and if I had not looked very carefully into the authorities to which he refers, I should have found great difficulty in differing from him in the conclusion at which he arrives. But, when I look at those cases which have been shortly referred to by my noble and learned friend, Sheddan v. Patrick, the Strathmore Peerage case, and Rose v. Ross, I really cannot see how they are to be taken, as laying down the rule upon which the Lord President founded his judgment; namely, a status indelible through life being affixed upon the party by the law of the country where that party was born, and affixing that character upon him even if domiciled in Scotland; the law of England being against legitimation by subsequent marriage. My noble and learned friend (Lord Lyndhurst), who unfortunately is not now present, who bore a principal part in the last of those cases, Rose v. Ross, expressly saves that question with respect to the domicile, and says that he gives no opinion upon that part of the case; and the result of what he says plainly is to show that

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he did not mean to say how it would have been if the domicile had been Scotch, the domicile in that case plainly being English; and the question, therefore, no more arose there than it would have arisen here had the fact of a Scotch domicile failed the pursuer; but the majority of the consulted Judges were agreed, in the early part of their opinion, that it did not arise at all. I am, upon the whole, of opinion that the case is not governed by the authority of those cases, or the dicta in these cases. It is chiefly, perhaps, what is said by Lord Redesdale, — which may not be very accurately reported, and which after all is only a dictum, and not necessary for the decision of the case, — it is chiefly on one or two dicta or supposed dicta of that noble and most learned Judge, — to whose dicta the greatest possible respect is due, — and not certainly upon any thing decided, that the Lord President founds his arguments.

My Lords, with respect to the case of Warrender v. Warrender [1], undoubtedly, as far as that case goes, it is in favour of the present decision, because the domicile of the parties there was clearly held to be Scotch. An attempt was made to show that Lady Warrender's domicile was not Scotch, with a view to another branch of the argument; but we all agreed here that her domicile was the domicile of her husband, and that both parties had a Scotch domicile, and we held the marriage in terms, and certainly in substance, to be in the nature of a Scotch marriage, although locally contracted in England. But although the case of Warrender v. Warrender might have rested entirely, and in my opinion safely, upon that position of the parties having

[1] Ante, p. 585.

a Scotch domicile, yet that case, properly speaking, did not depend entirely upon the Scotch domicile as regarded the nature of the marriage whether dissoluble or indissoluble. Upon the Scotch domicile, as regarded the jurisdiction of the Court, no doubt it must have rested; in order to give jurisdiction there must have been a domicile, although it might have been only temporary; but as regarded the domicile at the time of the marriage, that case did not rest entirely, or any thing like entirely, on the domicile of the parties being Scotch, or on its being, if you will, a Scotch marriage; because both myself and my noble and learned friend (Lord Lyndhurst), who concurred in that decision with me, clearly held, that although the parties had been domiciled in England,—that although it had been precisely Lolly's case, namely, an English marriage between English parties who never before in their lives had crossed the Tweed,—and although in that case, by the rule in Lolly's case, a divorce in Scotland of that marriage would have been impotent to dissolve it for all English purposes, including the right of the parties after the supposed dissolution to re-marry, for they would have been guilty of bigamy in England,—yet that in Scotland, for Scotch purposes, the divorce would have been valid to dissolve, to break the vinculum of the English marriage, as far as regarded all Scotch rights and all Scotch considerations. That was the clear opinion both of Lord Lyndhurst and myself. The only difference between our opinions was that I went a step further, and held that Lolly's case was wrongly decided even with respect to England. But neither he nor I entertained any doubt that Lolly's case did not and could not affect the law of Scotland, and

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that the decision we were then affirming in Warrender v. Warrender was good under the law of Scotland, independently of, and in spite of, the decision in Lolly's case, and without at all by possibility breaking in upon Lolly's case, any more than Lolly's case could break in upon it; in short, that in the case of Warrender v. Warrender, although the parties had held an English domicile, and had never before crossed the Tweed, there was a jurisdiction in the Scotch Court to deal with the question of marriage, and that the decree by that Court would have been valid notwithstanding the English domicile. And if your Lordships will only attend to the manner in which my noble and learned friend dealt with the whole of that question, which he went very elaborately through, you will see that there cannot be the least doubt upon what the effect of the decision was.

I have here, in passing, to make an observation, which I am sorry to say is somewhat in the nature of a complaint. Lord Eldon used often to complain in like manner. I do not go quite so far as he did, when he said that no Court was treated in such a way as this Court, the highest of all, was; but he certainly had a good right to complain of the manner in which what passed in this Court was taken, not always from the most accurate report of what was said. In the course of this session I have had occasion more than once to observe this, but I have never seen it so strikingly as in the present instance; because here are what are called the speeches of Lord Lyndhurst and myself in the Warrender case, given and printed in the appeal case for the appellant in Munro v. Munro before your Lordships from an extremely inaccurate note. I do not mean that the short-hand writer is not accurate; quite the

reverse; but I mean that in his note on the occasion referred to, as must needs sometimes happen when a person takes a note of a judgment when it is read, and when it is much more rapidly delivered than when it is spoken, there are very considerable inaccuracies either in taking the note, or having it transcribed. Those inaccuracies are perfectly evident to any person who reads the sentences in which they occur; the words are not sense in many instances, in other instances there are wrong dates and wrong statements, — statements very much the reverse of what were made, and in one or two instances affecting the substance and the import of the judgment. Now, what I complain of is, not at all that parties are very impatient to get a report of what passes here in their causes; that is very natural, and they may get it where they please, and get it more or less accurate; but what I complain of is, that after the lapse of a couple of years they should have printed those short-hand writers notes in these causes, and that then, after the lapse of a year or two, those short-hand notes should be made the foundation of remarks and of arguments in the Court below, when a perfectly accurate and corrected report compared with the original had been printed and published by the professional gentlemen in their authorized reports[1] of the decisions of this House. One should have thought the natural course was to have taken the decision of the case from the authentic report of the decision, as authorized by this House, and not from the note which, from some cause, contained these inaccuracies; but, instead of that, the Court below act upon the note which is printed, and

[1] 2 Sh. & M'L. p. 154.

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which is inaccurate, and then in your Lordships House that note is served up as part of the appendix, and not the note as taken (which it might have been very easily) from Shaw and M'Lean, who were at that time the appointed reporters of the decisions of your Lordships House.

Nevertheless, I find here that Lord Lyndhurst says, "It is a connexion (marriage) recognized in all Christian "countries, and they say (the Courts below, the Scotch "Courts, say), and I think they say with propriety, "we are not prevented from pronouncing sentence of "divorce a vinculo matrimonii in this country if the "parties are domiciled here, merely because a remedy "to the same extent is not given in other countries, "particularly where the marriage is celebrated." That is, as to the question of the dissoluble or indissoluble nature of the marriage. And then he goes on to remark upon the whole of the cases throughout, the regular succession of the cases in the Scotch courts, and to show that the Scotch Courts have uniformly, until the time of Lolly's case, (which is a fact,) exercised this jurisdiction, and dissolved English marriages, — marriages between English parties having no Scotch domicile or pretence of a Scotch domicile,—and that then a doubt for the first time existing, that doubt influenced the decision in Edmonstone v. Edmonstone[1], and afterwards the whole fifteen Judges differing from the Commissaries, who had been influenced by the decision in Lolly's case, set that matter right by reversing the decision of the Commissaries, and held that which has been the law ever since,—that without reference to domicile at all, the Scotch Courts

[1] Ante, p. 555.

have right to dissolve an English marriage between English parties, where the parties never had any domicile whatever in Scotland, and that in Scotland to all intents and purposes that divorce is good and valid.

This much I thought it right to say, in consequence of one or two observations that have been made upon the case of Warrender v. Warrender, not denying that so far as that case goes it is a decision at once in favour of the principle upon which the point in the present case turns, although certainly it cannot be said to be a decision, or anything like a decision, upon the point in question.

The other question is one of fact, namely, with respect to the domicile of the parties at the time of the marriage. I have not had the advantage which my noble and learned friend enjoyed of hearing that question argued at the bar. I have, nevertheless, gone through the whole of this case, which appears to lie in a much less narrow compass as regards facts than might be supposed, in consequence of the introduction of a good deal of matter, which does not appear quite irrelevant, and of a great deal of other discussion that perhaps was not perfectly essential to the case, although very able. But nevertheless there is abundant evidence to settle this question fully, in my humble apprehension, and to settle it against the decision of the Court below.

The whole question appears to me to turn upon what took place between the year 1794 and the year 1801, when the marriage took place. The party, Sir Hugh Munro, left Scotland, where it is not denied he had resided previous to that time. In the year 1794 he left Scotland, in consequence of some difference with his mother, and came to London. He there formed a

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connexion which ended in a marriage in September 1801; but previously to that marriage, namely, on the 16th May 1796, the pursuer (appellant) was born,—the child of that connexion. Now, up to 1794, it is perfectly clear that the domicile was Scotch; and it appears to be agreed on all hands that the rules which Lord Alvanley, then Master of the Rolls, extracted as he said from various decisions, —the Annandale case, Bruce v. Bruce, and other cases, to all of which your Lordships have been referred (ante, p. 600.),—were correct rules.

The third of those rules which he extracted from those decisions is very material to the present instance, and seems undeniable as the rule of the Scotch as well as of the English courts, — and I apprehend it is the rule universally, — that where a domicile has once been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the animus as well as the fact of leaving the place of residence in order to alter the former domicile and to acquire a new one. Now, looking at the facts here, I do not think that they amount to anything sufficient to support the conclusion of a change of domicile. The mere taking of the lease, as some of the learned Judges well observed in the Court below, is explained, and much that otherwise would not be so well understood, is explained by the same circumstance,—I mean by the connexion which the party had formed with the mother of the appellant. That he had a constant intention of returning is certain, and I do not go mostly upon the words he uses in the correspondence when he talks of returning, because that might only mean going back to the place from which he had come; but it is the whole disposition of his

mind which appears to run through this correspondence, which shows that it was the fixed intention of Sir Hugh Munro to consider Scotland still as the place of his residence, and that his being in London or any part of England was occasional rather than permanent.

For the reason which I have given, namely, that I had not the advantage of being present during the argument, I shall not enter into the consideration of the question of fact, further than to say, that upon looking at the whole of this case with very great care, under the pressure of that anxiety which one naturally feels, not only upon a question of such great importance to the parties, but upon a question where it was likely that the inclination of one's opinion should be against the judgment of the Court below, I certainly have come to the same conclusion with my noble and learned friend. Admitting that there may be some doubt,—admitting that there may be some conflict in the circumstantial evidence upon which that case must rest,—admitting that there is considerable force in several of the arguments of the learned Judge (Lord Corehouse), who agreed with the majority of the Judges, and differs from my noble and learned friend and myself on the question of domicile, yet still those observations are, in my opinion, sufficiently answered, and those doubts sufficiently explained, by the considerations which arise from the rest of the evidence, and from the peculiarity of the circumstances in which these parties were placed; and I think that upon the whole, your Lordships are entitled, or rather are called upon, to consider that at the period of the marriage the Scotch domicile had not been changed, and that the parties were domiciled as Scotch parties at the time when the contract took place. The conse-

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quences of this will be, that if your Lordships adopt the opinion of my noble and learned friend upon the subject upon these two points, you will concur in the question of law with almost the whole of the learned Judges; that you will upon that question give a decision which is in concurrence with the principles of those former cases which approach the nearest to the present; and that you will give a judgment, in my humble apprehension, which is consistent with all the principles of the law governing such matters; and upon the question of fact, upon which alone you are called upon to differ from the Judges of the Court below; differing also, it may be observed, from a very narrow majority of the Judges, for whereas six were of opinion that the domicile was Scotch, seven were of opinion it was not. Agreeing, as I have said, with almost the whole of them upon the question of law, and upon the question of fact differing with these Judges in the very narrow majority of one, your Lordships will, I trust, agree with my noble and learned friend in a decision reversing the decision of the Court below in Munro v. Munro. I apprehend that the decision to be given upon this case is not a judgment absolutely and generally finding that the party is legitimate; but it is a judgment finding according to the conclusions of the libel, which proceeds upon the statement of facts, that she ought to be found and declared, as lawful daughter, entitled to succeed under the entail as next heir. It is rather a finding of her having the right as heir of entail, quasi lawful daughter, than in terms or in fact a distinct judgment affirming the legitimacy; it is rather a judgment that she is heir of entail, notwithstanding what happened as to her being born before the marriage, than a distinct judgment that

she is legitimate, and taking into account that in construing the Scotch law, "legitimate" may mean per subsequens matrimonium.

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Judgment.

The House of Lords ordered and adjudged, That the said interlocutor complained of in the said appeal be and the same is hereby reversed: And it is declared, That the pursuer, the said Mary Seymour Munro, is the lawful daughter of Sir Hugh Munro, in terms of the conclusions of her summons: And with this declaration it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment and declaration.

W. S. GRUBBE—WILLIAM WITHAM, Solicitors.

NOTE.

The cause of Birtwhistle v. Vardill having been finally determined by the House of Lords on the same day as the two important causes of Lady Dalhousie v. M'Douall and Munro v. Munro, and the question decided in the first-mentioned case being,—whether a party, born in Scotland, and on whom the personal status of legitimacy had been conferred by the marriage, subsequent to his birth, of his parents, who were domiciled in Scotland, could take, as heir, land in England of which his father died seized and intestate? —it has been deemed proper to add, as an Appendix, the opinion of the Judges upon which the judgment of the House in Birtwhistle v. Vardill proceeded. The observations made by noble and learned Lords upon the occasion of proposing the question to be answered by the Judges, and when their opinion was delivered by Lord Chief Justice Tindal, have also been appended. For the report of the judgment of the House of Lords, reference may be had to the full report of the case by Mr. West.

The above question was answered in the negative, and the judgment of the House was thus in favour of the defendant in error,—but for reasons which in no degree interfere with, but which, on the contrary, stand well with the rule as settled by the two Scotch causes on the same day. The Judges in Birtwhistle v. Vardill held that the party could not take land by descent in England, because it is a fixed rule or maxim of the law of England, with respect to the descent of land from father to son, that the son must be born after actual marriage between his father and mother. That rule had been framed for the direct purpose of excluding, in the descent of land in that country, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother is held to make the son born before the marriage legitimate. The personal status of legitimacy conferred by the laws of another country, however clearly and universally recognized on the ground of the comity of nations, could not therefore be allowed to disturb an inflexible principle in the lex fori rei sitæ.

APPENDIX

TO THE CASES OF

COUNTESS OF DALHOUSIE *v.* M'DOUALL

AND

MUNRO *v.* MUNRO.

[10*th August* 1840.]

DOE, dem. JOHN BIRTWHISTLE, Plaintiff in Error.

[*Attorney General* (*Campbell*).]

AGNES VARDILL, Defendant in Error.

[*Dampier.*]

Marriage. — *Legitimation per subsequens matrimonium* — *Lex loci rei sitæ.* — A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death: A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B., who was born in Scotland: Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country: A. died seised of real estate in England, and intestate; — Held, upon consulting the Judges (affirming the judgment in K. B.), that B. was not entitled to such property as heir of A.

DOE, dem. BIRTWHISTLE, *v.* VARDILL.

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Statement.

JOHN BIRTWHISTLE was born in Scotland. His father, although a native of England, had gone to Scotland twenty years before his death, and during the whole of that time was domiciled there. The mother was a native of Scotland, and also domiciled there. The parents, some years after the birth of their son, were married in Scotland. The father died seised in fee of certain estates in England, and intestate, and the son claimed as heir. The case was tried on ejectment at York in 1825, the law of Scotland as to the marriage being proved by Scotch counsel. A special verdict was returned, it being found, among other things, that the claimant was "legitimate," in consequence of the marriage

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of his parents. The Court of King's Bench held that John Birtwhistle was not entitled to take land in England as the heir of his father; and upon a writ of error heard in presence of Judges in the House of Lords in 1830, the judgment of the King's Bench was approved by the Judges in the opinion delivered by Lord Chief Baron Alexander.—See report in Bligh, N. R., volume 9th.

The cause having stood over, it was appointed to be reargued by one counsel of a side, in presence of the Judges, and counsel having been fully heard, in the session of 1839, the following observations were made at the close of the argument, on proposing the question to the Judges:—

Ld. Chancellor's Speech.

Lord Chancellor.—My Lords. Your Lordships have had the advantage of having had this case, raising certainly a very important question, argued with the utmost learning and ability, and it will be for your Lordships now to consider in what way the question is to be submitted to the learned Judges, in order to call their attention to the point to be decided. Upon looking at the question put to the learned Judges in 1830, it seems to me very accurately to state the facts of the case necessary to be submitted to the learned Judges, and it does not appear to me that it can be done better by putting it in other words. That question was in these words: "A. went from England to Scotland, and re- "sided and was domiciled there, and so continued for many "years till the time of his death. A. cohabited with M., an "unmarried woman, during the whole period of his resi- "dence in Scotland, and had by her a son B., who was born "in Scotland. Several years after the birth of B., who was "the only son, A. and M. were married in Scotland accord- "ing to the laws of that country. By the laws of Scotland, "if the marriage of the mother of a child with the father of "such child takes place in Scotland, such child born in "Scotland before the marriage is equally legitimate with "children born after the marriage for the purpose of taking "land, and for every other purpose. A. died seised of real "estate in England, and intestate. Is B. entitled to such "property as the heir of A.?" That, therefore, is the

question I shall propose to your Lordships to submit to the learned Judges upon this occasion.

Lord Brougham.— My Lords. I entirely agree with my noble and learned friend that the question of 1830 is much better than any other which can be put. It raises the point upon the facts stated in the special verdict. That verdict did unfortunately not find particularly in every respect what the law of Scotland is upon this subject, consequently the argument of the learned counsel for the plaintiff in error pro tanto is damnified. It would have been better if it had been put as the learned counsel, Mr. Murray, stated it, whose evidence[1] was believed by the Judge and the jury, namely, that the marriage is supposed to have been antecedent to the birth by fiction; but the legitimacy, as contradistinguished from legitimation, is sufficiently put for the purpose of the argument, and with the assistance of the authorities it can leave very little doubt upon the minds of the learned Judges. Yet I cannot help expressing my regret at the length of time during which this suit has been pending. It was tried at York as long ago as 1825, and I very well recollect the trial. The delay of fourteen years certainly is a very great misfortune; it has been owing in part to the changes in the custody of the Great Seal. In 1830 the appeal was certainly prosecuted, but it was not decided, and it was not till 1835 that we were aware of it being still depending. If I had ever known, whilst I held the Great Seal, that it was undetermined, I should have called the attention of the House to it, and then there would have only been the delay from 1825 to 1830. It was not noticed, until another case brought it to your Lordships knowledge, that it was not disposed of. Some laches, too, probably, may be imputed to the parties. If they had reminded the House of it, no doubt the cause would have been heard; but I suppose there is something in the state of the property that did not make it very necessary, else they would have taken some means of obtaining an earlier judgment. My Lords, I am desirous that the atten-

[1] The law of Scotland, as to marriage, was proved by Scotch counsel.

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tion of the learned Judges should be directed to that, which, moved by the anxiety I felt upon the subject, I stated as the opinion I entertained in 1835, and to the arguments I then delivered. They have been printed, and will be furnished to the learned Judges. I do not know that they throw any great light upon the question, but they state the points, and refer to the authorities as well as to the principles. [*Mr. Attorney General.* — It is printed, my Lord, in the ninth volume of Bligh.] *Lord Brougham.*—Very well. My Lords, I entirely agree that this is a question of very great importance, and of very considerable difficulty. I quite agree with the Attorney General that it is of peculiar importance as affecting the law of Scotland, the question being whether the lex loci domicilii, the lex loci contractus et nativitatis, or also the lex loci rei sitæ, should prevail in this case; — from the time of Stair downwards, — from the time indeed when the distinction between real property and personal arose,— the law governing the one being the lex loci rei sitæ, and the law governing the other being the lex loci domicilii et contractus. I feel great anxiety that this case should be well considered, for another reason; I mean out of regard for the credit of our English Courts. I concur very much in the statement of the Attorney General, that if what has been laid down in this case be law, the bounds of that law are very narrow. If it is law any where, it prevails assuredly only as the law within the bounds of Westminster Hall. I know wherever I go in Europe it is boldly denied to be the law; I know the opinion of Dr. Story and other American jurists is also against us; and I do not think I could overstate the degree in which all those jurists dissent from the judgment in Doe v. Vardill. Moreover, if there is any reason to be given for the judgment, that reason is not in any one place. A considerable argument against it is to be gathered from the total diversity of the grounds upon which the judgment has at different times been maintained. It is first rested on one ground in the Court of King's Bench, then upon another and very different ground at the bar,—here, in 1830, again, upon a third ground, which I think must be admitted on all hands to be untenable, the ground stated by Lord

Chief Baron Alexander in giving the opinion of the Judges to this House, — and lastly, upon a different ground from all the three former, by the counsel to-day at your bar. And if the Judges are to give their opinions upon some fifth ground, the discrepancy may support the judgment better in their minds than it will support the judgment or give weight to it in the eyes of any other person; for assuredly a decision supported upon so many different grounds will be likely to sink low in the estimation of those who come to a calm consideration of its merits. I cannot help feeling the greatest regret that these questions should be raised here, so frequently as they have lately been. Dispose of this as you may, we shall have no end to such cases, unless we adopt the only satisfactory mode that can be devised for settling such controversies and doubts, namely, by some legislative measure to relieve the law of this country from the opprobrium which now rests upon it in the eyes of all mankind. That there should be a set of questions incalculably important, perhaps the most important, to the interest and feelings of individuals which can ever arise in courts of justice, and that these questions should be left surrounded with doubt, and incapable of decision, for want of some statutory enactment regarding these subject matters, is truly lamentable, and not a little opprobrious to our jurisprudence. Can any thing be more opprobrious to the law of a civilized country than that it should be extremely difficult to tell in this country whether a man is married or not? — nay, what is worse, whether a woman is married or a concubine; that it should be still more difficult to tell whether a person, the issue of an unquestioned marriage, is a bastard or legitimate; and that, owing to the conflict of law, or the discrepancy of the law, it should be declared in one part of the country that a man is a bastard, and in another that he is legitimate; in one part that a woman is married and in another that she is a concubine; in one part that divorce has taken place dissolving a prior marriage, and if that person afterwards crosses the Tweed, and intermarries with another woman, he is deemed not to be in the honourable and comfortable state of wedlock, but in a state of felony, and, having committed bigamy, he may be

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transported to Botany Bay, which actually has happened; and still more, that if the same party had intermarried again, in Scotland, he would be held to be in the honourable state of matrimony, and not of felony; but if he had English estates the question would arise, though the children were legitimate in Scotland, their birth-place, yet the law of the country where the property is situated declared them bastards; nay, that in only one Court in England they were treated as bastard, and in all other Courts acknowledged to be legitimate. There are peers sitting in this House affected by this question, the issue of noble families, their parents having been married in Scotland after previous divorces, they themselves being of the most spotless character and of the brightest honour, possessing the most magnificent estates, and the highest titles. It is just that question which is raised here, which was assumed to be so clear at the bar, — though I interrupted the counsel to show it was any thing but clear, — that the current of decisions set it in the opposite direction — and that the law would, if taken to be as so misstated, make these parties bastards who are now going about as legitimate children. It is a very horrid state of things affecting the feelings and the character as well as property of individuals, that there should be this uncertain state of the law. It is still worse to think, that all the learning and skill in Westminster Hall, if you were to consult it, and all the Scotch law in the Parliament House of Edinburgh, would not make you sure of getting two opinions to agree upon such questions as these. I hope this state of things will be put an end to. It never can be done satisfactorily without an act of parliament. You might say that a marriage should be good or bad in Scotland. If bad, of course the issue should be bastards all the world over. You might say that a divorce in Scotland was good and valid, provided it was not fictitiously obtained, and in fraud of the law of England. Some wise, wholesome, and really salutary provision of that kind is absolutely necessary. I have agreed all along with what has been said upon the law of England and Scotland, thinking the law of Scotland respecting the marriage contract exceedingly objectionable compared to ours. If a di-

vorce is obtained there by parties bonâ fide, it might be made good universally. If it is done in fraudem legis Anglicanæ, whereby it is also in fraud of the rights of others, you might enact that it should be void universally, and then a man would know whether he was married or not, and a woman whether she was a concubine or a matron, and the child whether he was a bastard or legitimate. If the Judges decide the present question, or any of those questions of status, one way, ever so satisfactorily, it does not follow that they will be settled. The difficulty just now suggested will arise, and you will have another series of doubts and difficulties which will not be removed, because they cannot be anticipated. I would remind your Lordships more particularly of one point. We all say, that marriage is governed by the law of the contract; that is, the canon upon the subject; it depends upon the lex loci contractus; that is to say, a marriage good by that law in the country where celebrated is also good all the world over. A divorce takes place. We do not go so far as to say, — though generally speaking the rule of law is, unumquodque dissolvitur eodem modo quo colligatur,—yet we do not go so far as to say that an English marriage may be validly dissolved by a Scotch divorce, though English parties may contract a Scotch marriage in Scotland which shall be good all the world over; we do not say, that the same law which is applicable to the constitution of the contract applies also to its dissolution. But there is a conflict, and a real conflict of laws. The Scotch lawyers say, that the Scotch divorce is good to dissolve an English marriage, and that a man so divorced may enter into marriage again; but this divorce by our English decisions is null, if he comes to England. The Scotch Courts maintain the efficiency of divorce, and consequently the validity of the second marriage, and they will maintain this to the end of time. All the Scotch lawyers and Judges without any exception say, that the second marriage is good in Scotland. I do say, that this conflict of law seems to involve an absurdity, which no judicial decisions can reconcile to itself. It is self repugnant, and nothing but an act of the legislature can reconcile it upon sound principles. A man comes here with his Scotch

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wife, and with issue born in Scotland; that Scotch wife is held to be a concubine for aught I know in England. The decisions go at all events to this extent, that the English law does not, as regards an English marriage, acknowledge the validity of the Scotch divorce. Here then a party may come, and after the Scotch divorce he may intermarry in England, and then there are two wives each claiming this husband. This is the conclusion either way; it is the conclusion from the well-established and well-known principle of allowing the lex loci contractus, — the law of the country where the marriage was contracted, — to prevail universally, and yet not allowing the law of the country where the divorce is had to regulate the dissolution of the contract.

One word more before closing these observations. Being moved by the considerations to which I have adverted, I introduced a bill into parliament in 1835 to cure this evil, and terminate so anomalous a state of things. I have been strongly urged to introduce it again. I own I had rather not do so pending this discussion, because I should hardly be able to accomplish my purpose without prejudicing this question, and I would therefore rather wait till it shall be decided. Now what is the real origin of all this embarrassment? A great deal arises from a country possessing one system of law being connected with a country possessing a different system, like Scotland and England, and these countries being contiguous. But much the greater part of the inconvenience has arisen from another source, and it shows the danger of departing from sound, solid, and uniform principles. If you had held originally that a marriage celebrated in Scotland, not bonâ fide by parties really resident there, but by parties who could not be duly married here, and who went to Scotland in fraudem legis Anglicanæ, to escape the provisions of the English marriage act, was a bad marriage in England, — if you had held, as you ought to have done, by that opinion generally, and declared it was a bad marriage, and that you would not allow parties who could afford to go to Scotland for the purpose of evading the marriage act, and who were really the only people contemplated by that act, to escape its provisions by this Scotch

journey; if, instead of holding that to be a good proceeding, and giving it effect, you had said, as you have done in most other cases, "This is done in fraudem legis, and shall not "prevail," then nine parts in ten of the difficulties we now labour under would not have arisen. Lord Mansfield always held those marriages to be void in England. Instead of following his opinion, when Crompton v. Bearcroft came into Doctors Commons, it was decided in favour of the Scotch marriage. I have often lamented that we have no account of that important case, except in a passage of Mr. Justice Buller's Nisi Prius. I applied to my late excellent and most learned friend Dr. Swabey, and he gave me a few notes, which showed how the case had arisen, namely, by letters of request from Lincoln, but threw little or no light upon the subject. The case does not seem to have undergone a thorough investigation; nevertheless it may have done so when it came to the Delegates, a Court certainly of the highest authority. There a judgment was pronounced in favour of the marriage, but on what argument or by what judges I know not. Then came Ilderton v. Ilderton, which first brought the question before a court of common law. If you look into that case, as reported in 2d H. Blackstone, you will find that the case of Crompton v. Bearcroft is cited. It was a writ of dower, to which ne unques accouple was pleaded, and there was a replication by the demandant of a marriage in Scotland, to which the tenant demurred. This demurrer was upon two grounds; the first denied the validity of a Scotch marriage in an English suit, and this ground was given up as an untenable point. The party never dreamt of arguing it, but confined the argument to another point, Whether there ought not to have been a place for the venue, and whether the replication ought not to have concluded with an appeal to the bishop's certificate, instead of concluding to the country. The question upon the marriage was then abandoned, and the judgment makes no mention of it. Ever since that time the point has been held to be clear, that a Scotch marriage, however plainly and grossly in fraudem leges Anglicanæ, was a valid marriage. Now the evil arose originally from your having decided that; you went wrong

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in so deciding, as many of us think; but having once gone wrong, when other kindred questions arose, as upon the validity of Scotch divorces, you ought either to have retraced your steps so as to get right again, or you should have continued acting upon the same principles; there was no middle course; either come back from your error in Ilderton v. Ilderton, and Crompton v. Bearcroft, or go on upon the same principle; either hold that the going to Scotland in fraud of the English law ought not to avail in any way, or hold that the Scotch proceeding, however fraudulent, does avail, and if it makes the contract valid, that it also validates the dissolution of the contract. But instead of following up your error you chose to hold the marriage good, but the dissolution of the marriage bad,—and see what interminable confusion you have thus got into. Now in Lolly's case the Judges had an opportunity of retracting Ilderton v. Ilderton and Crompton v. Bearcroft, or they might have said, the cases have ruled that the marriage is good, then so must the divorce be. But instead of that they maintained the validity of a Scotch marriage, though in fraud of the English law, and yet they held that a Scotch divorce in the same circumstances is utterly invalid; and hence arise all the difficulties and disagreements by which we are now surrounded. I am sure this is a good reason why judges in deciding important questions should adopt the course, when they have gone wrong, of at once in an open and manly way retracing their steps, rather than persist in their error; but if they do persist in their error they ought to do it out and out, though to the inconvenience of parties, and not, by way of saving their own consistency, impose on the people what is probably the most miserable of all inconveniences, that of vague and uncertain jurisprudence. Instead of having it uncertain, and subjecting people to this annoyance, it may be made at least intelligible by being made consistent, and though the principle were originally wrong, it may be made to tally with itself. At present it is inconsistent with itself; the principles are in one direction upon one ground, and in another direction upon another. I do hope that the result of this inquiry which has taken place will be the settlement

of the law; and I cannot speak too highly of the ability with which the argument has been conducted. I entirely agree with my noble and learned friend, that it is impossible to say too much upon that subject; and the question having been thoroughly argued is ripe now for decision. I hope that when it is fully considered we shall have the assistance of the learned Judges in giving our opinions. We shall give our opinions with all due deference to their authority, and all the disposition possible to avail ourselves of their useful aid, but without losing the regard that we conscientiously owe to our own opinions; not forgetting, certainly, the impression which may be made upon us by the opinion of the learned Judges, but coming to a full, calm, and deliberate consideration of a question of such paramount importance. When the law as it now stands has been thus settled, then ultimate steps may be taken, which I apprehend will alone be satisfactory to the people of both countries; I mean the final settlement of the law by an act of parliament, declaratory in some respects, and enacting in other respects; thus laying down what principles of law shall be fitting to be established for the two countries. I have felt it my duty to trouble your Lordships with these observations in the presence of the learned Judges and the parties, and I hope they may tend to the furtherance of justice in this case.

Lord Wynford.—My Lords, I cannot omit troubling your Lordships with one or two observations. Since I have been at the bar, now nearly fifty years, I have never heard a case argued with more ability than this case has been argued to-day. I have heard that ability exerted with great pleasure as to one of my friends, but greater pleasure with respect to the other, a young friend of mine who I have known from his earliest youth; and I am very sorry that the profession at large should not have the advantage of the full extent of his talents, in consequence of the situation he happens to hold in another place. My Lords, I believe I am the only peer now present who was in the House at the time the question was put to the learned Judges upon the former

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occasion. That question was drawn up by Lord Lyndhurst, and submitted to the Judges. I approved of it then, and I approve of it now; I do not think any question can be put that will more effectually elicit the opinions of the learned Judges. My Lords, I have a strong opinion upon this subject, which I have not hesitated to express upon other occasions; but if it should so happen that all the learned Judges agree in their opinion, it would be highly improper in me not to give way to them, as the Judges know I have upon several occasions; but if there is a difference of opinion among them, I shall take the liberty of stating my view of the questions; at present all I shall say is, that I do not object to the question proposed to be submitted to the learned Judges. I wish my noble and learned friend to accomplish his object of reconciling the laws of Scotland and England in similar cases to this, but I am afraid that my noble and learned friend will find very great difficulties in his way. I cannot help thinking that it might be better settled by different decisions as the matters arise, rather than by an act of parliament. I do not think that the legislature is well adapted to take up and settle a very difficult question like this. However, we shall, I hope, have an opportunity of fully considering the various points as we always have in this place, particularly when assisted by the learned Judges, when cases come judicially before us. With respect to the question,— considering the circumstances which my noble friend has alluded to,— the way in which it affects different families in both countries, having large estates and high houses,— it is of the utmost importance it should be settled, and that it should be decided as soon as possible when the Judges have matured their opinion. It is of deep importance, when that matured opinion is come to, that an early period should be fixed for the consideration of the question. It must not be supposed that this is the only case which has stood over for a great length of time. The next case which stands for hearing, I am sorry to say, is a case that was before me in the Court of King's Bench when a judge of that court, now nearly twenty years ago. I hope some mode will be adopted when points of very great importance arise of bringing

them forward, so that the parties may obtain justice as soon as possible.

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The Lord Chancellor again read the question to be proposed to the Judges, and the same was agreed to.

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On the 20th July 1840 Lord Chief Justice Tindal delivered the opinion of the Judges as follows:—

Lord Chief Justice Tindal.—"My Lords, the facts of the "case upon which your Lordships propose a question to "Her Majesty's Judges are these: A. went from England "to Scotland, and resided and was domiciled there, and so "continued for many years till the time of his death. A. "cohabited with M., an unmarried woman, during the whole "period of his residence in Scotland, and had by her a son, "B., who was born in Scotland. Several years after the birth "of B., who was the only son, A. and M. were married in "Scotland according to the laws of that country. By the laws "of Scotland, if the marriage of the mother of a child with "the father of such child take place in Scotland, such child, "born in Scotland before the marriage, is equally legitimate "with children born after the marriage for the purpose of "taking land and for every other purpose. A. died seised of "real estate in England, and intestate. And your Lordships "found this question upon the foregoing state of facts; viz., "'Is B. entitled to such property as the heir of A.?' And in "answer to the question so proposed to us, I have the honour "to state to your Lordships that it is the opinion of all the "Judges who heard the argument[1] that B. is not entitled "to such property as the heir of A. We have, indeed, "reason to lament that we have been deprived of the assist-"ance of one of our learned brethren, who heard this case "argued at your Lordships bar, the late Mr. Justice "Vaughan; but as he had expressed a concurrent opinion

[1] Lord Chief Justice Tindal, Mr. Justice Vaughan, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Patteson, Mr. Baron Gurney, Mr. Justice Williams, Mr. Justice Coleridge, Mr. Justice Coltman, Mr. Justice Maule.

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" upon the case at a meeting held immediately after the " argument, I feel myself justified in adding the authority " of his name to that of the other Judges.

" My Lords, the grounds and foundations upon which our " opinion rests are briefly these: That we hold it to be a " rule or maxim of the law of England with respect to the " descent of land in England from father to son, that the " son must be born after actual marriage between his father " and mother; that this is a rule juris positivi, as are all the " laws which regulate succession to real property, this par- " ticular rule having been framed for the direct purpose of " excluding in the descent of land in England the appli- " cation of the rule of the civil and canon law, by which the " subsequent marriage between the father and mother was " held to make the son born before the marriage legitimate; " and that this rule of descent, being a rule of positive law " annexed to the land itself, cannot be allowed to be broken " in upon or disturbed by the law of the country where the " claimant was born, and which may be allowed to govern " his personal status as to legitimacy upon the supposed " grounds of the comity of nations.

" My Lords, to understand the nature and force of this " rule of our law, ' that the heir must be a person born in " ' actual matrimony in order to enable him to take land in " ' England by descent,' and to perceive at the same time " the positive and inflexible quality of this rule, and how " closely it is annexed to the land itself, it will be necessary " to consider the earlier authorities in which that rule is laid " down and discussed, both before and subsequently to the " statute of Merton, and more particularly the legal con- " struction and operation of that statute.

" If we take the definition of heir which Lord Coke adopts " from the ancient text writers, and which is borrowed origi- " nally from the Roman law (Co. Litt. 7. b.), namely, that he " is ' ex justis nuptiis procreatus,' the very description points " at a marriage celebrated according to the rules, requisites, " and rituals of the civil or Roman law. ' Operæ pretium " ' est scire quæ sint justæ nuptiæ,' says Huber (lib. 23. " tit. 2. de ritu nuptium). He adds, ' in promptu est Jus-

" 'tiniani responsa sunt ea quæ secundum precepta legum " 'contrahuntur.' But to refer to the Mirror of Justices, " perhaps the very earliest of our text books, it is there laid " down, in page 70. as an admitted principle, 'that the com- " 'mon law only taketh him to be a son whom the marriage " 'proveth to be so.' Glanville, who wrote in the reign of " Henry the Second, (probably about half a century before " the passing of the statute of Merton,) in book 7. chap. 13. " states that 'neither a bastard, nor any person not born in " 'lawful wedlock, can be, in the legal sense of the term, an " 'heir; but if any one claims an inheritance in the cha- " 'racter of heir, and the other party objects to him that he " 'cannot be heir because he was not born in lawful wed- " 'lock, then indeed the plea shall cease in the King's Court, " 'and the archbishop or bishop of the place shall be com- " 'manded to inquire concerning such marriage, and to " 'make known his decision either to the king or his jus- " 'tices.' He then, in chapter 14., gives the form of the " writ, which will be found not unimportant to the present " inquiry; namely, 'The king to the archbishop, health.— " 'W. appearing before me in my court has demanded " 'against R., his brother, certain land, and in which the " 'said R. has no right, as W. says, because he is a bastard " 'born before the marriage of their mother; and since it " 'does not belong to my court to inquire concerning bas- " 'tardy, I send these unto you, commanding you that you " 'do in the court christian that which belongs to you; and " 'when the suit is brought to its proper end before you, " 'inform me by your letter what has been done before you " 'concerning it. Witness, &c.'

" Your Lordships will observe the form of this writ, how " precisely it puts the objection against the heir's title upon " the very rule of the English law, that 'he was born before " 'the marriage of his mother;' by which it is necessarily " implied that the marriage of the parents had subsequently " taken place. Now if the question had been put generally on " the fact whether any marriage had taken place, or upon the " legality of such marriage as had taken place, to such a ques- " tion of general bastardy, as it is called, the bishop would

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" have found no difficulty in answering, for the answer to " that question would have been purely and exclusively de- " terminable by the spiritual law. But as the canon law, " on the one hand, held that the subsequent marriage of the " parents made the antenatus legitimate, and as the common " law of England, on the other hand, held that such ante- " natus was not legitimate for the purpose of inheriting " land in England, if the question had gone in the general " form the answer of the bishop would have certified such " antenatus to have been legitimate. The law, therefore, " framed the question in the precise form contained in the " writ, namely, a question of special bastardy; proving " thereby how closely, and with how much jealousy, the law " adhered to the rule of descent before pointed out. Now " the question so framed did obviously place the bishop in " extreme difficulty in making answer thereto; a difficulty " which was very much increased by the constitution of " Pope Alexander the Third, which had been issued very " recently before the time when Glanville wrote, viz., in the " sixth of King Henry the Second; by which constitution " (in part set out by Lord Coke, 2d Institute, 96.) it was or- " dained, ' that children born before solemnization of matri- " ' mony, where matrimony followed, should be as legitimate " ' to inherit unto their ancestors as those that are born after " ' matrimony;' and it is upon the subject of this constitution " that Glanville is commenting in his 15th chapter when he " says, ' Upon this subject it hath been made a question, " ' whether if any one was begotten or born before the " ' father married the mother, such son is the lawful heir if " ' the father afterwards married his mother. Although, in- " ' deed, the canons and the Roman laws consider such son " ' as the lawful heir, yet according to the law and custom " ' of this realm he shall in no measure be supported as " ' heir in his claim upon the inheritance, nor can he de- " ' mand the inheritance by the law of the realm. But yet " ' if a question should arise whether such son was begotten " ' or born before the marriage, or after, it should, as we " ' have observed, be discussed before the ecclesiastical " ' judge, and of his decision he shall inform the king or his

" 'justices; and thus according to the judgment of the " 'court christian concerning the marriage, namely, whe- " 'ther the demandant was born or begotten before mar- " 'riage contracted or after, the king's court shall supply " 'that which is necessary in adjudging or refusing the in- " 'heritance, respecting which the dispute is, so that by its " 'decision the demandant shall either obtain such inheri- " 'tance or lose his claim.'

" The bishop being placed in the difficulty of this con- " flictus legum, by reason of the precise form of the king's " writ, at length, at the parliament holden at Merton in the " twentieth of Henry the Third, the statute was framed " which will be found to have a strong and direct application " to the present question. That statute has not upon the " original roll the title prefixed thereto, upon which obser- " vations were made at your Lordships bar, that it showed " the intention of the law to have been no more than to " declare the personal status of those who are described in " such statute. In the edition of the statutes published " under the commission from the crown there is no other " than the general title, 'Provisiones de Merton;' and no " more argument can justly be built upon the title prefixed " in some editions of the statutes than upon the marginal " notes against its different sections. That statute or pro- " vision of Merton runs thus; viz. 'To the king's writ of " 'bastardy, whether any one being born before matrimony " 'may inherit in like manner as he that is born after matri- " 'mony, all the bishops answered, that they would not nor " 'could not make answer to that writ, because it was " 'directly against the common order of the church; and " 'all the bishops instanted the lords that they would con- " 'sent that all such as were born before the matrimony " 'should be legitimate as well as they that be born within " 'matrimony, as to the succession to inheritance, for as " 'much as the church accepteth such as legitimate; and all " 'the earls and barons with one voice answered, that they " 'would not change the laws of the realm which hitherto " 'had been used and approved.'

" It is manifest from Bracton, who lived and wrote in the

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" time of Henry the 3d, that shortly after the statute of " Merton this question of special bastardy ceased to be " sent to the bishop, and became the subject of enquiry " and determination in the king's courts. In book 5. c. 19., " after stating the circumstances attending the statute of " Merton, and also a subsequent council holden in the " same year before the king, the archbishop, the bishops, " earls, and barons, whose names he gives, it is ordered, " 'that the words in which the writ shall go to the bishop " 'shall be, whether such a one was born before espousals " 'or marriage, or after; and that the ordinary shall write " 'back to our lord the king in the same words and with- " 'out any evasion or subtlety;' and he then states it " was further ordered at that council, 'that for the reason " 'before given of such common consent it may be in the " 'election of our lord the king, whether he will demand " 'that inquisition to be taken before the ordinary or in " 'his own court, because when the exception is properly " 'taken the answer ought not to be obscure.' And accord- " ingly it will be found by reference to the Year Books, that " from the time of Edward the 3d the distinction became " settled, that general bastardy shall be tried by the ordinary, " special bastardy per pais. (See the various authorities col- " lected in Viner's Abridgment, Title 'Trial,' 'Bastardy.')

" My Lords, the extent of the dominions of the crown at the " time of the passing of the statute of Merton demands par- " ticular attention. Normandy, Aquitaine, and Anjou were " then under the allegiance of the King of England, and had " been so at least from the commencement of the reign of " Henry the First. Many of the nobles and other subjects " of the king had large possessions both in England and " the countries beyond sea. Those born in Normandy, " Aquitaine, or Anjou, (as also in subsequent periods of our " history those born in Calais or Tournay,) whilst under the " actual dominion of the crown, were natural-born sub- " jects, and could inherit land in England. (Calvin's case, " 7th Coke, 20. b.) Many of the very persons who attended " at the coronation of Henry the Third, the occasion on " which the parliament met at Merton and the statute was

" passed, both bishops and earls and barons are known from " history, and would so appear from their very names and " titles, to have been of foreign lineage if not of foreign birth, " and were, at all events, well acquainted with the rule of law " which was then so strongly contested, yet, notwithstanding " the rule of the civil and the canon law prevailed both in " Normandy, Aquitaine, and Anjou, by which the subse- " quent marriage makes the antenatus legitimate for all " purposes and to all intents; and notwithstanding the " precise question then under discussion was, whether this " rule should govern the descent of land locally situated in " England, or whether the old law and custom of England " should still continue as to such land, under which the ante- " natus was incapable to take land by descent, there is not " the slighest allusion to any exception in the rule itself as " to those born in the foreign dominions of the crown, but " the language of the rule is in its terms general and uni- " versal as to the succession to land in England. The ques- " tion is, whether after the declaration made by that statute " one of the king's subjects born in Normandy, Aquitaine, or " Anjou, under the circumstances supposed by your Lord- " ships, could have inherited land in England. It is not so " much a parallel case with the present,—it is the very case " itself, and it seems impossible to contend that such would " have been held to be the law. In the first place, there is " no other form of any writ to the bishop than the old form " given in Glanville and Bracton, which raises the express " point, whether the claimant was born or not before " espousals and matrimony of his father and mother. And " if the question was brought before a jury, as afterwards " became the course of proceeding, then there was no other " than that precise issue which could be raised upon the " record. Further, if the question was sent to the bishop, " it must have been sent to the bishop of the diocese where " the action was brought, that is, where the land was situate, " and not that of the bishop of the diocese where the party " whose legitimacy is disputed was born, (see the book of " Assisa, 35 fol. 7.) which case seems not obscurely to indi- " cate that if the birth had been in France the trial would

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" be still before the English bishops; for Skipworth, a Judge " of Common Pleas, is made to say there, 'you may carry " 'your proofs before him in what place you please in " 'England or from France." Again, the contest above " adverted to was a contest between the ancient law and " custom of England on the one hand, and the canon law on " the other, which should prevail as to the hereditary suc- " cession to land in England. Canon and civil law being " acknowledged and prevailing in England in all other " respects, with the single exception of its application to the " descent of land, the same canon and civil law prevailing " in the foreign dominions of the crown generally, and with " out any exception, there seems, therefore, no reasonable or " probable ground for the surmise of any intentions in the " lawmakers of that day, that, with the general refusal and " repudiation of this rule of the civil and canon law as to " the hereditary succession to land in England, there should " be a tacit exception in favour of a claimant born beyond " the seas. Again, the custom would rather seem to be one " which applies to the land itself, and not to the person only " of the claimant. According to an observation of Bracton " in the place above cited, when discussing the very point " of the exception on the ground of bastardy, he says, 'that " 'every kingdom hath its own customs differing from those " 'of others; or there may be one custom in the kingdom " 'of England, and another in the kingdom of France, as to " 'succession.' And it would be singular indeed, if any " such exception existed, that neither Bracton, who wrote " with so much diffuseness on this very question, at the time " of this notable refusal of parliament to alter the law, nor " the author of Fleta, nor any of the other early writers, " should have left the slightest vestige of an allusion to such " exception in the rule.

" On the contrary, the observation of Lord Coke, 2 Inst. 98. " although not made in any case in a court of law, proves in " a manner which leaves no doubt what would have been " the opinion of that great lawyer upon the point now under " discussion if it had arisen in his time. 'Some have " 'written,' he says, 'that William the Conqueror being

" 'born out of matrimony, Robert his reputed father did " 'after marry Arlot his mother, and that thereby he had " 'right by the civil and canon law! but that is contra " 'legem Angliæ, as here it appeareth.' This is in effect " saying, although born in Normandy, and legitimate in " Normandy by the subsequent marriage of his father and " mother there, so that he could inherit land in Normandy, " yet as to land in England he could not take it by descent, " for the same would be the law of descent of a kingdom, " and of land within it. This is the very case now put to " the Judges by your Lordships.

" It therefore appears to be the just conclusion from these " premises, that the rule of descent to English land is that " the heir must be born after actual marriage of his father " and mother in order to enable him to inherit, and that this " is a rule of a positive inflexible nature applying to and " inherent in the land itself, which is the subject of descent, " of the same nature and character as that rule which pro- " hibited the descent of land to any but those who were of " the whole blood to the last taker, or like the custom of " gavelkind or borough-English, which cause the land to " descend in the one case to all the sons together, in the " other to the younger son alone.

" And if such be, as it appears to us to be, the rule of law " which governs the descent of land in England, without any " exception either express or implied therein on the score " of the place of birth of the claimant, it remains to be con- " sidered whether by any doctrine of international law or by " the comity of nations that rule is to be let in by which B. " being held to be legitimate in his own country for all pur- " poses must be considered as the heir at law in England.

" The broad proposition concluded for on the part of the " plaintiff in error is, that legitimacy is a personal status to " be determined by the law of the country which gives the " party birth, and that when the law of that country has " once pronounced him to be legitimate, he is by the comity " of international law to be considered as legitimate in " every other country also, and for every purpose; and it is " then contended, that as by the Scotch law there is a pre- " sumptio juris et de jure, that under the circumstances

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" supposed, the parents of B. were actually married to each " other before the birth of B., so such presumption of the " Scotch law by which his legitimacy is effected must also " be adopted and received to the same extent in the English " Courts of Justice.

" Now, there can be no doubt but that marriage, which " is a personal contract, when entered into according to the " rites of the country where the parties are domiciled and " the marriage celebrated, would be considered and treated " as a perfect and complete marriage throughout the whole " of Christendom.

" But it does not therefore follow, that with the adoption " of the marriage contract the foreign law adopts also all " the conclusions and consequences which hold good in the " country where the marriage was celebrated. That the " marriage in question was not celebrated in fact until after " the birth of B., is to be assumed from the form of the " question. Indeed, except on that supposition, there would " be no question at all. Does it follow then, that because " the Scotch hold a marriage celebrated between the parents " after the birth of a child to be conclusive proof of an " actual marriage before, a foreign country which adopts " the marriage as complete and binding as a contract of " marriage must also adopt this consequence? No authority " has been cited from any jurist or writer on the subject " of the law of nations to that effect; nothing beyond the " general proposition, that a party legitimate in one country " is to be held legitimate all over the world. Indeed the " ground upon which this conclusion of B.'s legitimacy is " made by the Scotch law is not stated to us, and we have " no right to assume any fact not contained in the question " which your Lordships have proposed to us. We may " however observe that, in the course of the argument at " your Lordships bar, the ground has been variously stated " upon which the laws of different countries have arrived " at the same conclusion. It was asserted that, by the law " of Scotland, the subsequent marriage is not to be taken " to be the marriage itself, but only evidence, though con- " clusive in its nature, of the marriage prior to the birth of " B. That the canon law rests the legitimacy of the son

" born before such marriage upon a ground totally different, " viz. that having been born illegitimate he is made legitimate—legitimatus—by the subsequent marriage, by a " positive rule of law, on account of the repentance of his " parents; whereas by the Scotch law a marriage previous " to his birth is conclusively presumed, so that he was " always legitimate, and his parents had nothing to repent " of. Pothier, on the other hand, (Contrat de Marr. Part V. " ch. 2. art. 4.) when he speaks of the effect of a subsequent " marriage in legitimating children born before it, disclaims " the authority of the canon law, nor does he mention any " fiction of an antecedent marriage, but rests the effects " upon the positive law of the country. He first instances " the custom of Troyes: 'Les enfans nés hors de marriage de " 'soluto et soluta, puisque le père et la mère s'épousent, " 'l'un l'autre succèdent et viennent à partage avec les " 'autres enfans, si aucuns y a;' and then adds, 'that it is a " 'common right received through the whole kingdom.'

" Now, it would never be contended by any jurist that " the law of England, with respect to the succession of " land in England, would be bound to adopt a positive law " of succession like that which holds in France, the distinction being so well known between laws that relate to " personal status and personal contracts, and those which " relate to real and immoveable property, for which it is " unnecessary to make reference to any other authority than " that of Dr. Story, in his admirable Commentaries on the " Conflict of Laws (see sections 430 and following, where " all the authorities are brought together); and if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for " the introduction into the English law of descents, not only " of the contract of marriage observed in another country, " which is admitted to be adopted, but also of a fiction with " respect to the time of the marriage, that is, in effect, of " a rule of evidence which the foreign country thinks it " right to hold?

" But admitting for the sake of argument, and we are " not called upon to give an opinion on that point, that B., " legitimate in Scotland, is to be taken to be legitimate all

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" the world over, the question still recurs whether for the " purpose of constituting an heir to land in England, some- " thing more is not necessary to be proved on his part than " such legitimacy? And if we are right in the grounds on " which we have rested the first point, one other step is neces- " sary, namely, to prove that he was born after an actual mar- " riage between his parents, and if this be so, then upon the " distinction admitted by all the writers on international " law, the lex loci rei sitæ must prevail, and not the law of " the place of birth.

" In the course of the discussion some stress appears to " have been placed on the argument, that if B. had died " before A. the intestate, leaving a child, such child might " have inherited to A., tracing through his legitimate parent; " and then it was asked, if the child might inherit, why not " the parent himself inherit? But the answer to that sup- " posed case appears to be, that if the parent be not " capable of inheriting himself, he has no heritable blood " which he can transmit to his child, so that the child could " not under the assumed facts have inherited, and the ques- " tion, therefore, becomes in truth the same with that " before us. The case supposed would be governed by the " old acknowledged rule of descent, ' Qui doit inheriter al " ' pere doit inheriter al fitz.'

" The two decided cases[1] which have been relied upon in " the course of the argument, that of Sheddan v. Patrick, " and that of the Strathmore Peerage, do not upon con- " sideration create any real difficulty. Those cases decide " no more than that no one can inherit without having the " personal status of legitimacy, a point upon which all " agree, but they are of no force to establish the main " point in dispute in this case, viz. that such personal status " is sufficient of itself to enable the claimant to succeed as " heir to land in England.

" Upon the whole, in reporting to your Lordships as the " opinion of the Judges, ' that B. is not entitled to the real " ' property as the heir of A.,' I am bound at the same time " to state, that although they agree in the result, they are

[1] See ante, p. 586.

" not to be considered as responsible for all the grounds " and reasons on which I have endeavoured to support and " explain such opinion."

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Lord Chancellor.—The subject upon which your Lordships have had the opinion of the Judges is of so much importance, and the learning contained in that able opinion is of such a description, as in my opinion to require further consideration. I shall, therefore, propose to your Lordships that the further consideration of the case be postponed.

Ld. Chancellor's Speech.

Lord Brougham.—I perfectly agree in opinion with my noble and learned friend. It is quite impossible to express more strongly than I desire to do the obligations which I think your Lordships and the law are under to the learned Judges, for the very able, elaborate, and lucid opinion they have given.

Ld. Brougham's Speech.

It is perhaps enough to say respecting this opinion of the learned Judges, that in a case which has undergone argument in every form for somewhere about twelve years past, both in the sister kingdom and here,—first in the different Courts of Westminster Hall, and next at your Lordships bar —upon which the learned Judges in the Courts below, upon former occasions, in deciding the questions submitted to them, and the learned Judges here in assisting your Lordships—have given their opinions, and discussed the points—nevertheless, at the eleventh hour as it were, and at the very end of this long-continued discussion, very great new light, if I may express it, has been thrown upon the question by the reasonings of the learned Judges, and very important additions have been made by the arguments to-day to those arguments and that learning which had been brought to bear upon that question in its former shape, in your Lordships House, in Westminster Hall, and in the Courts of Scotland.

Under these circumstances, it is not for me to say that the opinion, or rather the leaning of opinion, which it is well known to your Lordships I formerly expressed, is not materially altered by the quite new form in which the argument is now placed. I am by no means prepared to state that I shall not, on reconsidering the reasons of the learned Judges

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now submitted, find a sufficient answer to the difficulties which formerly pressed upon me, which I very fully stated to your Lordships, I think, in the year 1835.

Upon these grounds I entirely agree in thinking that the further consideration of this case ought to be postponed. I ought to add, that in the whole of the first part of the reasoning of the learned Judges I was prepared to agree. What I have doubted is the latter part of the reasoning. One thing has struck me, that supposing your Lordships shall ultimately be of opinion that you ought to decide in favour of the defendant in error, and to affirm the judgment of the Court below, it will be absolutely necessary that the legislature should interfere in order to allay the evils which will arise out of the conflict of law, respecting the personal status in the two parts of the kingdom.

Further consideration postponed.

The cause having (10th August 1840) been put down for judgment, Lord Brougham and the Lord Chancellor severally expressed their opinions. (See Mr. West's Reports of English and Irish Causes in the House of Lords, Volume 1st.)

The Lord Chancellor, in moving judgment in favour of the defendant in error, expressed his satisfaction with the grounds upon which the Judges rested their opinion; *his* Lordship observing, that the question being one which involved the right of succession to real property in England, the decision of it necessarily depended exclusively on the principles which regulate the descent of land in that country.

Judgment.

The House of Lords ordered and adjudged, That the said judgment given in the said Court of King's Bench be and the same is hereby affirmed; and that the record be remitted, to the end such proceeding may be had thereupon as if no such writ of error had been brought into this House.

T. Briggs—Law and Tindal, Solicitors.

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